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No. 178. October Term, 1902.

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Supreme Court of the United States.

GEORGE C. RANKIN

(WHO SUCCEEDS GEORGE H. HIGGINS),

Receiver of the Keystone National Bank of Erie, Pennsylvania, Plaintiff in Error,

vs.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY.

In Error to the United States Circuit Court of Appeals for the Third Circuit.

Transcript filed October 21, 1901.
(18,294.)

BRIEF OF PLAINTIFF IN ERROR.

ASA W. WATERS,
Of Counsel for Plaintiff in Error.

Allen, Lane & Scott, Pts., Phila.

Supreme Court of the United States.

October Term, 1902. No. 178.

George C. Rankin, Receiver of the Keystone National Bank of Erie, Plaintiff in Error,

vs.

The Fidelity Insurance, Trust and Safe Deposit Company.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

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BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

(Page references in Brief are to Transcript of Record.)

The Keystone National Bank of Erie, Pennsylvania, hereinafter designated as the "Bank," was duly organized under the National Banking Act in 1864, and for about thirty-three years did a banking business in

the city of Erie, Pennsylvania. In 1865 its capital stock was $250,000, divided into 2500 shares of $100 each (page 17), and this capital was continued until December 2d, 1892, when it was reduced to $150,000, divided into 1500 shares of $100 each, and it thereafter so continued. Before the reduction of its capital the Comptroller had given notice, on March 16th, 1892, that its then capital was impaired, and the Bank thereupon made an assessment, under section 5205 of the Revised Statutes of the United States, and section 4, Act of June 30th, 1876, upon its shareholders of twenty-five per cent., or $62,500. This assessment was paid voluntarily by the stockholders. On June 29th, 1897, the Comptroller found the Bank insolvent and closed its doors, and on July 26th, 1897, appointed Frank M. Hayes Receiver (page 17); he resigned, and George H. Higgins was appointed April 17th, 1899, and he resigning, George C. Rankin, on March 31st, 1902, was appointed and is now Receiver.

The Comptroller ordered an assessment, under sections 5151 and 5234, Revised Statutes of the United States, on November 3d, 1897, for $150,000 (one hundred per cent.), payable December 3d, 1897, and directed the Receiver to collect same by suit or otherwise. (Page 18.)

One-ninth of this assessment is in dispute in this action.

On February 1st, 1893, the Bank issued its certificate No. 236, in its usual form, for one hundred and

seventy-two and one-half shares to W. W. Hand. (Page 112.) This certificate was sent to defendant in compliance with following letter :—

"PHILADELPHIA, January 24, 1893.

"*Keystone National Bank of Erie,*

"GENTLEMEN :—Enclosed you will find certificates No. 180, 181, each 100 shares, No. 183, 30 shares of your Bank to be exchanged in accordance with the resolution of stockholders December 2, 1892. You will please return *the new certificates to the above address.* (that of defendant.)

"Very truly yours,

"CHARLES ATHERTON,
"*Treasurer.*"

(Page 32.)

On February 10th, 1893, defendant wrote Bank acknowledging receipt of one hundred and seventy-two and one-half shares (page 32), and on the same day Hand, at request of defendant, executed an assignment and power on the back of the certificate in words as follows :—

"For value received hereby sell, transfer and assign to the shares of stock within mentioned and authorize to make the necessary transfer on the books of the Bank.

"Witness my hand and seal this 10th day of February 1893.

"W. W. HAND. [L. S.]

"Witnessed by
"HARRY J. MOORE."

(Page 112.)

Defendant has continued to hold this certificate so indorsed to the present day.

On November 13th, 1893, defendant wrote to Bank :—

"GENTLEMEN: You will please send us your last statement and any other information in regard to the affairs of your Bank that might interest us.

"Very truly yours,

"CHARLES ATHERTON,

"*Treas'r.*"

(Page 32.)

The following additional letters were received from defendant, by Bank before failure, to wit:—

"PHILADELPHIA, March 20, 1894.

"*Matthew Griswold, President, Keystone National Bank, Erie, Pa.,*

"DEAR SIR: *This Company holds 172½ shares of your Bank registered in the name of W. W. Hand.* We would like you to send us a copy of your last statement and any other information in regard to the business of the Bank, and as to whether there is any sales of stock, and what price. *We would like to sell our holdings if marketable.*

"Yours truly,

"CHAS. ATHERTON,

"*Vice Prest.*"

(Page 32.)

"PHILADELPHIA, April 4, 1894.

"*Mr. Matthew Griswold, Prest. Keystone National Bank, Erie, Pa.*

"DEAR SIR:—You will please answer my letter of March 20th asking for information in regard to the business of your bank. We would like you to send us a copy of your last statement published, also would like to know

if there has been any sales of stock within the last six months, or what price the last was sold at. As we have a loan of $22,000. depending on the value of 172½ shares we desire the above information.

"Very truly yours,

"CHARLES ATHERTON,

"*Vice President.*"

(Page 108.)

Replying to defendant's letters of March 20th and April 4th, 1894, the Bank wrote as follows:—

"ERIE, PA., April 7, 1894.

"*Charles Atherton, Vice President, Philadelphia, Pa.*

"Your favor of March 20th and April 4th addressed to Matthew Griswold President, were delivered to Mr. Griswold's home, and on account of the absence from the city of Mr. Griswold and family were duly delivered at the Bank this morning. Hence reason for delay in replying. The general upsetting of banking business the past year has been rather discouraging in profit earnings, which we regret to say were not large, owing principally to large withdrawals of dep. sits which of course contracted our loaning power. There has been no change of stock since last May. *A small block which brought par. I enclose copy of last statement.*

"Respectfully,

"F. V. KEPLER."

(Page 107.)

Three years after 1894 the following letters were written to Bank by defendant:—

"PHILADELPHIA, March 17, 1897.

"*F. V. Kepler, Esq., Cashier, The Keystone Natl. Bank, Erie, Pa.*

"DEAR SIR:—*This Company owns 172½ shares of the stock of your bank registered in the name of W. W. Hand.* We

would be much obliged for any information you can give us in regard to the business of the bank, and a copy of your last statement to the Comptroller. Do you know of any sales of the stock and at what price sold? We are anxious to sell the stock to close an account. *If you can put us in the way of finding a customer, we will pay the usual commission.*

"Yours truly,

"CHAS. ATHERTON,
"*Vice-President.*"

(Page 33.)

"PHILADELPHIA, March 20, 1897.

"*F. M. Lamb, Esq., Cashier Keystone National Bank, Erie, Pa.*

"DEAR SIR:—This company owns 172½ shares of the stock of your bank registered in the name of W. W. Hand. We would be much obliged for any information you can give us in regard to the business of the bank or a copy of the last statement to the Comptroller. Has there been any sales of stock within the last year, if so at what price. We wish to close the account for which this is collateral. *If you can put us in the way of finding a customer we will pay you the usual commission.*

"Yours truly,

"CHARLES ATHERTON,
"*V. P.*"

(Page 108.)

"PHILADELPHIA, April 8, 1897.

"*F. M. Lamb, Esq., Cashier Keystone National Bank, Erie, Pa.*

"DEAR SIR:—March 17th I addressed a note to Mr. F. V. Kepler supposing he was still cashier of your bank. He said he was not connected with the bank and referred me to you. *On March 20th, I wrote you, this company owns 172½ shares of the stock of your bank registered in*

the name of W. W. Hand. Since we have held the stock we paid an assessment and the number of shares reduced. We have no knowledge of the bank affairs. We would like to have the last statement to the Comptroller and any other information in regard to the business of the bank you will give us. Are there any market for the stock and at what price? We are anxious to sell this stock to close an account. If you can put us in the way of selling the stock *we will pay a commission.*

"Yours truly,

"CHARLES ATHERTON,
"*V. P.*"

(Page 108.)

Replying to the last three letters the Bank wrote:—

"ERIE, PA., April 14, 1897.

"*Charles Atherton, Esq., V. P., Phila., Pa.*

"Enclosed find report of this bank March 9th, 1897. As regards sale of the stock, I think there would be a poor chance at the present time. Since our trouble of several years ago we have made no dividends, the condition of business being such that it has not been advisable to do so. Business is picking up in this locality. Should it continue we would get our share of it and be able to make dividends. Now, then will be a chance for a sale of stock. I will keep this matter in mind and should I find a chance for a sale will let you know. I have been out of the city, thus the delay in answering yours of 8th.

"Respectfully yours,

"F. M. LAMB,
"*Cashier.*"

(Page 107.)

All these letters bear date more than two months prior to Bank's failure. Defendant wrote another

nearly two months after the Receiver's appointment and about three weeks before the assessment of November 3d, 1897, as follows:—

"PHILADELPHIA, October 14, 1897.

"*F. M. Lamb, Esq., Cashier Keystone N. Bk., Erie, Pa.*

"DEAR SIR:—I saw a report in one of the newspapers that your bank was going into voluntary liquidation. You will please inform us whether the report is true, and if so will there be any value in the stock. *The stock in the name of W. W. Hand belongs to this company.* Please give us such information as you can.

"Very truly,

"CHAS. ATHERTON,
"*Vice President.*"

(Page 33.)

Thus Receiver, Comptroller, and Bank were advised by defendant that the stock standing in the name of W. W. Hand belonged to it and not to Hand, and pursuant to these advices the Bank's cashier had written above the name "W. W. Hand," in his account in the stock ledger (months before the Bank's failure) the name "The Fidelity Trust & Safe Deposit Co., Phila., Pa.," as owner of one hundred and seventy-two and one-half shares. The Receiver finding this situation, under direction of Comptroller, demanded payment of the $17,250 assessment upon these shares from defendant. (Pages 19–109.)

The officers of the Bank understood the defendant to be the owner of the stock and acted accordingly. (Page 61.) The stock ledger showing the name

"Fidelity Trust & Safe Deposit Co., Phila., Pa.," written over that of Hand (pages 20, 49, 59), together with the stock certificate book, showing transfer to Hand and its transmission of certificates to defendant, and the foregoing letters claiming ownership, were open to the inspection of creditors and shareholders of the Bank for a long time prior to its failure. (Pages 36, 37, 39, 40, 50, 55, 61.) It was from these books that the list of shareholders was made up, as required by section 5210, Revised Statutes United States. (Pages 25, 47, 56.) The last report to the Comptroller, giving a copy of the list of shareholders, verified by the oath of the president or cashier of the Bank, was presumably made as required by law on the first Monday of July, 1896, nearly one year prior to the failure.

The evidence of writing name of defendant above that of W. W. Hand on the books as a fact to establish an estoppel to deny ownership of the shares to creditors by defendant was excluded by the trial court and not permitted to go to the jury and is the first assignment of error.

In plaintiff's statement, under the Pennsylvania practice, filed March 21st, 1899 (page 8), it is alleged, as ground of estoppel, that said

> "The Keystone National Bank of Erie recognized no other owner of said shares of stock than said defendant and represented to its creditors, whenever an occasion presented, that said defendant was the real owner of said

one hundred and seventy-two and one-half shares of its capital stock, and that the said W. W. Hand stood only as agent for said defendant in the holding of the same, and plaintiff says that credit was given said banking association on account of said ownership of said stock and contracts, debts and engagements, owing to its creditors, which the assets and credits of said banking association are wholly insufficient to pay and discharge, were created upon the liability of said defendant as a stockholder of said banking association, as provided by sections 5151 and 5234 of the Revised Statutes United States."

This certificate, No. 236, for one hundred and seventy-two and one-half shares (page 112), never passed to the custody of W. W. Hand; it was forwarded by Bank direct to defendant and immediately, at its request, assigned over and delivered to and held by defendant to present time, and in such manner that at any time it could be transferred to its own name. Hand never had any interest whatsoever in the shares. He was, in the holding, simply agent of defendant.

The statement made heretofore presents, it is urged by plaintiff in error, the substantial facts which govern this case, but it is necessary, in order to have a complete appreciation of the claim of the Receiver and of the defense made by the defendant in error, to begin a history of these one hundred and seventy-two and one-half shares four years prior to the issue to W. W. Hand of certificate No. 236. (Page 112.)

On March 1st, 1889, Delamater & Co., a banking

firm of Meadville, Pa., borrowed of defendant $15,000, and pledged as collateral security two hundred and thirty shares of the Bank.

The shares were valued at the time at par ($23,000) and the bank was in good credit, and for twenty-seven years had regularly paid and was then paying semi-annual dividends. The note was the usual collateral note with power to sell upon default in payment at maturity. It was signed by Delamater & Co., and the two hundred and thirty shares belonged to that firm, although standing in individual names of its members. George B. Delamater had one hundred shares issued March 1st, 1865 (Certificate No. 21), and thirty shares issued April 6th, 1871 (Certificate No. 57), and George W. Delamater one hundred shares issued February 4th, 1889. (Certificates Nos. 168-169 of fifty shares each.) Delamater & Co., with the certificates, and at the same time also delivered to defendant assignments and powers of attorney authorizing it to transfer the shares on the books of the Bank executed in blank as to the name of transferee, and bearing date on or before that of delivery. (Pages 37, 38, 39, 40, 77, 79, 80, 90, 91, 92, and 93.)

This note of Delamater & Co., of March 1st, 1889 (page 10), was not paid at maturity, and from time to time renewal notes were given upon payment of interest by Delamater & Co. for a period of nearly two years; the last renewal note bore date November 15th, 1890, and was payable sixty days

after its date and it matured, with grace, on January 17th, 1891. During the renewal period the two hundred and thirty shares remained in the name of George B. and George W. Delamater on the books of the Bank and the Delamaters voted the shares and exercised all the rights of shareholders and were paid by Bank all dividends, and defendant during this period exercised no right of ownership in the shares, made no use whatever of the blank assignments and powers, but held them just as they were delivered by Delamater & Co., and defendant gave no notice of any kind to the Bank that the shares had been pledged to it by the Delamaters, nor at any time was any notice given to Bank by the Delamaters, Delamater & Co., or their assignees, of a pledge of the shares.

On December 5th, 1890 (twenty days after Delamater & Co. gave this last renewal note), that firm failed and executed a general deed of assignment for the benefit of their creditors, under insolvent laws of Pennsylvania, to George W. Haskins and John O. McClintock, of Meadville, Pa. (Pages 110, 111.) Notice of this assignment was at once brought to defendant, for we find on December 17th, 1890, it addressed a letter to "Delamater & Co., or their Assignees," as follows:—

"PHILADELPHIA, December 17th, 1890.

"*Messrs. Delamater & Co., or their Assignees, Meadville, Pa.*

"GENTLEMEN:—We hold a note of Delamater & Co., dated November 15th, 1890, due in sixty days, secured by

230 shares of Keystone National Bank of Erie, and have to notify you that the same cannot be renewed. If you are prepared to anticipate the payment and have the collateral returned we will be glad to arrange it. The note bears interest at 6% from date.

"Yours respectfully,

"R. PATTERSON,
"*V.-P.*"

(Page 93.)

It seems that the assets of the assigned estate of Delamater & Co. were insufficient to anticipate the payment of the note, and release the collateral.

On January 3d, 1891, the appraisers appointed by the Court of Common Pleas of Crawford Co., Pennsylvania, in the insolvent proceedings, completed the inventory and appraisement of that assigned estate, and the assignees of Delamater & Co. were charged with $8000 as equity in the two hundred and thirty shares, being the difference between the appraisement of the stock, $23,000, and the loan of $15,000 by the defendant. (Page 64.)

With full notice of all these proceedings at Meadville, Pa., defendant, without the knowledge, consent or ratification of the Delamaters, Delamater & Co., or their assignees, suddenly, on January 10th, 1891 (one week before the maturity of the note), by the hand of its then treasurer, Charles Atherton, filled into the blank assignments and powers of attorney (delivered to it nearly two years before by Delamater & Co.) the name "W. W. Hand" (a clerk in its employ since

1879) (page 30), and enclosed the certificates, assignments, and powers, so by it filled in to the Bank with the following letter:—

"THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT
"COMPANY,
"325–331 Chestnut Street,
"PHILADELPHIA, January 10, 1891.

"*Keystone National Bank of Erie, Penna.*

"GENTLEMEN:—We enclose herewith certificates for two hundred and thirty shares capital stock of your bank which we wish transferred to W. W. Hand, viz.:

"Certificate No.	57,	Regd.	Geo. B. Delamater	30 shares
" "	21,	"	do.	100 shares
" "	168,	"	Geo. W. Delamater	50 shares
" "	167,	"	do.	50 shares
				230

"You will please return to us certificates two one hundred shares each, one thirty shs.

"Yours truly,

"CHAS. ATHERTON,
"*Treas'r.*"

(Pages 31, 34, 35.)

Three days later, on January 13th, 1891, the Bank paid a semi-annual dividend of two per cent. ($460 on two hundred and thirty shares). (Page 51.) It does not appear from the record that either the defendant or the Delamaters were paid this dividend, which proved to be the last dividend paid by the Bank. It accounts, however, for the sudden move of the de-

fendant to have the shares transferred a week before maturity of the note.

It does not appear from the evidence that defendant had any fear of the responsibility to creditors of holding the shares in its own name, nor that W. W. Hand was then or is now financially irresponsible.

It appears clearly in the record that W. W. Hand was without any interest whatsoever in the shares, never owned them (page 25), nor had them in his custody (page 26), nor did he have any interest in the loan (Page 30.)

The defendant forwarded the shares for transfer to Bank and received them when transferred from Bank; W. W. Hand, at its request, executed assignments and powers of attorney to and the shares were always in the custody of defendant. He was simply agent of defendant for holding the shares; but at no time did he notify Bank that the shares had been pledged by Delamater & Co. to defendant. His agency in holding the shares was disclosed to Bank by defendant.

The defendant, impatient because of delay in hearing from Bank, wrote to it as follows:—

"THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT
"CO.,

"325–331 Chestnut St.

"(the officers of the company being named).

"PHILA'A, JANUARY 17, 1891.

"*Keystone National Bank, Erie, Pa.*

"GENTLEMEN:—We mailed you per registered letter on the 10th inst. 230 shares of stock of your bank for

transfer. We have no acknowledgement. Was it received?

"Yours truly,

"CHARLES ATHERTON,

"*Treasurer.*"

(Page 41.)

On January 17th, 1891, the Bank mailed certificates for two hundred and thirty shares, as requested, to defendant, and on January 19th, 1891, defendant acknowledged receipt as follows:—

"THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT "CO.,

"(the officers and address being named).

"PHILA'A, Jan. 19, 1891.

"*Keystone National, Bank Erie, Pa.*

"GENTLEMEN:—Your favor of the 17th inst. received enclosing certificates for 230 shares of stock of the bank registered in the name of W. W. Hand. *We would like to have a bid for the stock if you know of a purchaser.*

"Yours truly,

"CHARLES ATHERTON,

"*Treasurer.*"

(Page 42).

The Delamater certificates (Nos. 21, 57, 168, 169), assignments, and powers surrendered by defendant to Bank on January 10th, 1891, and the certificates for the two hundred and thirty shares in the name of W. W. Hand returned to defendant (Nos. 180, 181, and 183), were in form the same as certificate No. 236, and the assignment and power of attorney indorsed thereon. (Page 112.)

The Bank, upon receipt of the Delamater certificates and instructions in defendant's letter of January 10th, 1891, opened an account in the name of W. W. Hand in its stock ledger, and transferred two hundred and thirty shares from George B. Delamater and George W. Delamater (one hundred and thirty from the former and one hundred from the latter) to him, and duly canceled the certificates, Nos. 21, 57, 168, 169, which had been surrendered to it by defendant, and issued new certificates, Nos. 180, 181, and 183, for the shares in the name of W. W. Hand, bearing date January 15th, 1891, which, it will be noted, was two days before the maturity of Delamater & Co.'s note. The Bank sent these certificates to defendant on January 17th, 1891, and F. V. Kepler, assistant cashier, wrote on the stubs in the Bank's stock-certificate book: "Sent to Fidelity Insurance, Trust and Safe Deposit Co., Phila, Pa., 1-17-91" (pages 34 and 42), and on January 19th, 1891, defendant acknowledged receipt of the shares. (Pages 31 and 42.)

There was no notice of any kind to or knowledge, consent, or ratification by the Delamaters, Delamater & Co., or their assignees at this time or at any time thereafter of this transfer by defendant to W. W. Hand. Neither the Delamaters nor their assignees had any official connection with the Bank, and all of them resided in a city many miles distant from Erie, Pa., and at no time were in communication with the Bank.

The ownership of the shares had passed by the blank assignments and powers, *first*, from George B. and George W. Delamater to Delamater & Co. (this was prior to March 1st, 1889); *second*, on March 1st 1889, from Delamater & Co. to defendant, and on December 5th, 1890, from Delamater & Co. by general deed to assignees (pages 110, 111); thus, every interest in the shares, contingent or otherwise, had completely passed from George B. and George W. Delamater before March 1st, 1889, and from Delamater & Co. on December 5th, 1890. On March 16th, 1892, the Comptroller (under section 5205, Revised Statutes) had given notice to Bank that owing to impairment of its capital an assessment of twenty-five per cent. was necessary to be made upon its shareholders. (Page 17.) Pursuant to this notice, on September 5th, 1892, the directors of the Bank passed the following resolution :—

> "*Resolved*, That the assessment ordered by the Comptroller of the Currency be assessed, notice given, and payment ordered within ten days from this date."

(Page 53.)

On September 16th, 1892, the Bank received the check of the defendant for twenty-five per cent. on the two hundred and thirty shares, $5750, inclosed in a letter signed "W. W. Hand" (page 54), as follows :—

"PHILA'A, September 16, 1892.

"*Mr. J. I. Towne, Cashier Keystone National Bank, Erie, Pa.*

"Replying to your letter of the 7th, calling for assess-

ment of 25 per cent. on 230 shares of stock in your bank, *standing in my name*, I herewith enclose check for the amount payable $5750. and will thank you to return the proper receipt. You will further oblige by stating whether any progress *has been made towards cancelling the $50,000. shares of your stock held by you, or if any further reduction of the capital stock.*

"Yours Repectfully,

"W. W. HAND."

The $5750 thus paid was credited to the stock ledger account of Hand. (Pages 20, 53, 54.) This payment is admitted to have been made by defendant. The letter itself must have been dictated by Mr. Atherton, then treasurer, and is intrinsic evidence of Hand's simple agency for the defendant in holding the shares.

Afterwards, on December 2d, 1892, at a meeting of the stockholders of the Bank, the following questions were voted upon :—

"*First.*—As to a reduction of $50,000 by the cancellation of that amount of stock of the Bank held by it as collateral security for loans made, the payment of which both principal and interest has been defaulted.

"*Second.*—The further *pro rata* reduction of the capital stock of the Bank twenty-five per cent. of the reduced capital, leaving the capital stock of the Bank $150,000."

W. W. Hand voted by proxy the two hundred and thirty shares in the affirmative of both these propositions (pages 52, 53), and on January 10th, 1893, at a stockholders' meeting of the Bank, he voted the shares by proxy. (Page 52.) These votes of Hand's

were at the instance of defendant and under its direction, and on January 24th, 1893, the Bank received from defendant the following letter, as before stated:

"PHILA'A, Jan. 24, 1893.

"*Keystone National Bank, of Erie, Pa.*

"GENTLEMEN:—Inclosed you will find certificates 180 and 181, each for 100 shares; No. 183, 30 shares, of your Bank, *to be exchanged in accordance with resolutions of stockholders, December 2, 1892. You will please return the new certificates to this address.*

"Very truly yours,

"CHARLES ATHERTON,

"*Treasurer.*"

And, in obedience to this last letter, as heretofore stated, certificate No. 236, for one hundred and seventy-two and one-half shares, involved in this case, was issued, and the stub of the bank's stock certificate book shows that it was sent by registered mail February 7th, 1893, to defendant (page 43), and receipt thereof was acknowledged in the following letter, before quoted:—

"PHILADELPHIA, February 10, 1893.

"*F. V. Kepler, Cashier Keystone, National Bank, Erie, Pa.*

"DEAR SIR:—Yours of the 7th received, with certificate for 172½ shares new stock of your bank.

"Very truly yours,

"CHARLES ATHERTON,

"*Treasurer.*"

On May 1st, 1895 (more than two years before failure of Bank), the assignees of Delamater & Co. called

at the office of defendant to make some adjustment of the supposed equity in the shares, for their final accounting of the assigned estate to the court, and they were then, for the first time, much to their surprise, informed by defendant that an assessment of $5750 had been paid, and the number of shares reduced from two hundred and thirty to one hundred and seventy-two and one-half, and that the remaining shares were not of sufficient value to pay the claim, and that they belonged to defendant. (Pages 65, 66, 67, 80, 81, 82, 83, 84.)

On July 13th, 1896 (more than five years after failure of Delamater & Co.), the assignees filed their final account with the Court of Common Pleas of Crawford County, Pennsylvania, and in it they are credited with $8,000, charged against them in their first account as the equity in the two hundred and thirty shares, it being therein stated, as reason for asking the credit, "Said stock having been converted by the holder of the note and said stock having been assessed to the amount of twenty-five per cent. of its face value, did not sell for enough to pay the debt for which it was pledged" (pages 69, 70, 82, 83), and this credit, with the explanation given in the final account, was asked by the assignees, because of the representations made to them by defendant on May 1st, 1895. (Page 83.) This final account, as filed, was confirmed by the court (page 69) on the first Monday of August, 1896 (a year before Bank's failure).

The above entry of the assignees in their final account was excluded by the trial court and not permitted to go as evidence to the jury, and plaintiff's exceptions to that ruling are found in assignments of error, Nos. 3, 4. (Pages 150, 151.)

The total distribution from the proceeds of the assigned estate of Delamater & Co. was less than six per cent, of the face value of the claims proven against it. (Page 73.)

It has been stipulated by all parties hereto that any further printing of exhibits than that contained in the bill of exceptions is waived. (Page 38.)

Since the maturity of the note on January 17th, 1891, there has at no time been a demand of payment made upon the individual members of the firm of Delamater & Co. by defendant, and all rights of action against them were barred in six years thereafter, on January 17th, 1897, under the laws of Pennsylvania (five months before failure of Bank).

Plaintiff in error claims :—

First.—That the trial court erred in excluding from the jury the evidence that defendant upon its notice that it owned the shares had been entered upon the books of the Bank, before its failure, as a stockholder, by the Bank's cashier. This tended to establish the estoppel.

Second.—That the trial court erred in excluding from the jury the evidence contained in the final ac-

count filed by the assignees of Delamater & Co., corroborative of their individual recollection as to the representations of ownership made by them on May 1st, 1895, and their consequent abandonment of every interest of the assigned estate. This tended to establish the estoppel.

Third.—That upon all the evidence in the case defendant in error is estopped to deny that it is a shareholder of one hundred and seventy-two and one-half shares, and responsible to creditors for the contracts, debts, and engagements of the Bank, and that binding instructions should have been given the jury in plaintiff in error's behalf.

Fourth.—That defendant in error is in truth the real owner of the shares, and for this reason binding instructions should have been given to the jury in plaintiff in error's behalf.

ASSIGNMENT OF ERRORS.

(See pages 149 to 158, inclusive, of transcript.)

First.—The plaintiff in error assigns as error the several errors set out in the assignment of errors forming part of the record in the above-entitled action before said Circuit Court of Appeals, to wit :—

1. That said court erred in refusing to permit counsel for plaintiff in error to introduce in evidence at the trial of said cause an entry in the stock ledger of said Bank over the name of W. W. Hand, in an account opened with the said W. W. Hand at the request of the defendant corporation, showing the holding and ownership of one hundred and seventy-two and one-half shares of the stock of said Bank, being the stock in issue in this case, and for the collection of the assessment ordered by the Comptroller of the Currency, upon which the defendant is sued, the said stock ledger having first been admitted in evidence, the witness (Higgins), while testifying to the entries in said book, was about to state that, written over the name of W. W. Hand, in the stock ledger of the Bank, in the handwriting of its cashier, were the words, "The Fidelity Trust and Safe Deposit Company, Philadelphia, Pa." ; that the entry there had been made in the regular course of business and at the time the certificates, at the instance of the defendant, were issued in the name of W. W. Hand, pursuant to written instructions from the defendant corporation to the Bank, that it was the

owner of the stock standing in the name of W. W. Hand, and intended to follow the same up by showing that this book for many years, with this entry of the name of the defendant corporation written over that of W. W. Hand, together with letters from the defendant corporation stating that it was the owner of the stock, had been open to the inspection of the shareholders and creditors of the Bank before its failure, and that the entry was made by the officer of the Bank for the purpose of advising the shareholders and creditors of the Bank of the information they had that the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia was the real or beneficial owner of the stock which stood in the name of its agent. W. W. Hand.

2. That the said court erred in overruling the objection of counsel for plaintiff in error to the introduction in evidence at the trial of said cause, by the witness W. W. Hand, who was permitted to testify that the original loan was made by the defendant corporation to Delamater & Co. on November 15th, 1890. The witness having previously testified that he had no personal knowledge of the matter; that he never came in contact with the Delamaters; that his only information was obtained from the officer of the Fidelity Company, and that his business was simply that of clerk to make entries on its books, and that he had no personal recollection upon the subject; the witness also having testified that the note dated November

15th, 1890, was a renewal. It was also objected by counsel that witness was permitted to testify that the signatures to the obligation was that of Delamater & Co. without having seen any one sign the note, and without having any personal contact with Delamater & Co., or any member of its firm, or any personal recollection of the matter.

3. That the said court erred in refusing to permit counsel for plaintiff in error to introduce in evidence at the trial of said cause the following testimony contained in the deposition of John O. McClintock, a witness produced upon behalf of the plaintiff, and one of the assignees for the benefit of creditors in the deed of assignment made by Delamater & Co.:—

"Q. Did you make a further account in the matter of the assignment of Delamater & Co. as assignees? If so, state when and what, if anything, was said, to the best of your recollection, in that account in regard to the charge made against you on account of the two hundred and thirty shares of stock of the Keystone National Bank, heretofore referred to in this deposition.

"A. On the 13th of July, 1896, we, the assignees of Delamater & Co., filed in the above-mentioned case our final account. In this final account we were charged with this item referred to in the question, as follows: 'Equities in stocks and bonds pledged as collateral on loans unadjusted, as follows: (*a*) $23,000 stock of the Keystone National Bank of Erie pledged for the

loan of $15,000 appraised at $8000,' and we were credited with item No. 48, as follows: 'Accountants claim credit for loan of $15,000 charged at $8000.'" (The trial court admitted the testimony to this point, excluding what follows.) "Said stock having been converted by the holder of the note, and said stock having been assessed to the amount of twenty-five per cent. of its face value, did not sell for enough to pay the debt for which it was pledged."

"Q. Was this credit in your second and final account allowed by an order of the court?

"A. It was. The account as filed was finally confirmed by the court.

"Q. Will you state when and where it was recorded?

"A. It was finally confirmed and allowed on the first Monday of August, 1896, and is recorded in the Account Book No. 1, at page 539 of records of the Court of Common Pleas of Crawford County, Pennsylvania.

"Q. This final account of yours, as assignees of Delamater & Co., was filed, then, more than one year after your meeting with the defendant company on or about the first of May, 1895? What connection, if any, had that meeting with your statement in your account with reference to this account?

"A. In relation to this equity?

"Q. Yes.

"A. The statement made by us in our claim of

credit for this item of $8000 was made from the information obtained by us in our interview with the officer of the defendant company on or about the first of May, 1895."

4. That the said court erred in refusing to permit counsel for the plaintiff in error to introduce at the trial the following testimony in the deposition of George W. Haskins, one of the co-assignees for the benefit of creditors of Delamater & Co. and a witness produced upon behalf of creditors of plaintiff in error as follows, to wit:—

"Q. I hand you the final and last account that you filed in that assigned estate, and ask you to look at item No. 48 and refresh your memory in regard to it, and state the matter therein set forth?

"A. In our final account item No. 48 the accountants claim credit for the item of $23,000 Keystone National Bank of Erie stock pledged for the loan of $15,000 charged at $8000." (The trial judge admitted this much of the answer, but refused to admit what follows in this answer and the following answers here quoted.) "Said stock having been converted by the holder of the note and said stock having been assessed to the amount of twenty-five per cent. of its face value, did not sell for enough to pay the debt for which it was pledged." This final account was allowed and approved by the Court of Common Pleas, of Crawford County, Pennsylvania, in the matter of the assignment of Delamater & Co. entered to No. 52 February term, 1891.

"Q. When was the account finally confirmed?

"A. On the first Monday of August, 1896."

5. That the agreements as to facts and the matters therein contained and the evidence produced at the trial of the above-entitled cause are not sufficient in law for the said defendant to have or maintain its aforesaid judgment against the said plaintiff in error; the said defendant thereby being estopped to deny its liability for the assessment levied by the Comptroller of the Currency of one hundred per cent. upon the one hundred and seventy-two and one-half shares of the capital stock of said Keystone National Bank of Erie with interest thereon at six per cent. per annum from the day the same was made payable, December 3d, 1897.

6. That by the record of the above-entitled cause it appears that the verdict of the jury and the judgment was given for the said Fidelity Insurance, Trust and Safe Deposit Company against the said Frank M. Hayes as Receiver of the Keystone National Bank of Erie, Pa. Whereas, by the law of the land the verdict of the jury and the judgment ought to have been given for the said Frank M. Hayes as Receiver of the Keystone National Bank of Erie, Pa., against the said Fidelity Insurance, Trust and Safe Deposit Company in the sum of $17,250 with interest at six per cent. per annum from December 3d, 1897.

7. That the said court erred in refusing to give to the jury the following instructions (plaintiff's first

point) requested by the plaintiff in error at the trial of said cause, the facts set forth therein, and if found true by the jury constituting an estoppel in law to the defendant to deny its liability for the collection of the assessment sued on. The said first point being in words as follows, to wit:—

"1. If the jury find that in November of 1890 the Delamaters were the owners of two hundred and thirty shares of the stock of the Keystone National Bank of Erie; that, being such owners at said time, they pledged such shares as collateral security for their note of $15,000 with the defendant corporation and delivered the shares of stock, with blank powers on the back, to transfer, duly assigned by them, accompanied by authority in the defendant corporation in case of default in payment of said note, to sell said shares; that in December, 1890, the Delamaters failed, and made an assignment for the benefit of their creditors; that the defendant corporation, in January, 1891, caused said shares to be transferred upon the bank's books, for its benefit, with its assent, into the name of its clerk, W. W. Hand; the said assignment to Hand was not known to or approved of, by Delamaters or their assignees; that subsequently, anterior to the year 1895, without the knowledge, assent, or approval of Delamaters, or of their assignees, the defendant corporation caused Hand to give powers of attorney, which were acted upon, authorizing proxies to vote for the election of directors of said Bank, and to vote for

the reduction of its capital stock; the corporation defendant caused the certificate of two hundred and thirty shares to be surrendered by the Bank at the time its capital stock was reduced from $250,000 to $150,000, and took in lieu thereof, in the name of W. W. Hand, for its benefit, one hundred and seventy-two and one-half shares of the stock of said Bank; that the said shares have ever since remained on the books of the Bank in the name of Hand; that at the several times of issuance to Hand of the certificate for two hundred and thirty shares, and of the issuance to him of the one hundred and seventy-two and one-half shares, he executed and delivered to the defendant corporation, which retained the latter until the present time, said certificates with blank powers to transfer the same; that in 1895 the assignees of Delamaters called at the office of the corporation defendant, and, upon being there referred to the proper officer thereof, were informed that the corporation defendant was the owner of said shares; that, in pursuance of said information, the assignees asked and obtained in their account credit for shares; that, before and after the failure of the Bank, the corporation defendant, in writing, informed the officers of the Bank that it was the owner of said one hundred and seventy-two and one-half shares; that there has been no interference of any sort or kind since January, 1891, by the Delamaters or their assignees with the corporation defendant in the possession and use of said shares; and that no de-

mand has been made upon Delamaters since 1891 for the payment of their note for $15,000, and no admission by them has been made of any indebtedness thereon, you must find a verdict for the plaintiff."

8. That the said court erred in refusing to give to the jury the following instruction (being plaintiff's second point) requested at the trial of the above-entitled cause by the plaintiff in error. The said second point being in words as follows, to wit:—

"2. If the jury find that in November of 1890 the Delamaters were the owners of two hundred and thirty shares of stock of the Keystone National Bank of Erie; that being such owners at said time, they pledged said shares as collateral security for their notes of $15,000 with the defendant corporation and delivered the shares of stock, with blank powers on the back, to transfer, duly signed by them, accompanied by authority in the defendant corporation, in case of default in payment of said notes, to sell said shares; that in December, 1890, the Delamaters failed and made an assignment for the benefit of their creditors; that the defendant corporation, in January, 1891, caused said shares to be transferred upon the Bank's books for its benefit, with its assent, into the name of its clerk, W. W. Hand; that said assignment was not known to, nor approved of by, Delamaters or their assignees; that subsequently, anterior to the year 1895, without the knowledge, assent, or approval of Delamaters or of their assignees, the defendant corporation caused Hand

to give powers of attorney, which were acted upon, authorizing proxies to vote for the election of directors of said bank and to vote for the reduction of its capital stock, the corporation defendant caused the certificates of two hundred and thirty shares to be surrendered by the Bank at the time its capital stock was reduced from $250,000 to $150,000, and took in lieu thereof, in the name of W. W. Hand, for its benefit, one hundred and seventy-two and one-half shares of the stock of said bank; that the said shares have ever since remained on the books of the Bank in the name of W. W. Hand; that at the several times of issuance to him of the one hundred and seventy-two and one-half shares, he executed and delivered to the defendant corporation, which retained the latter until the present time, said certificates, with blank powers to transfer the same; that in 1895 the assignees of Delamaters called at the office of the corporation defendant and, upon being there referred to the proper officer thereof, were informed that the corporation defendant was the owner of said shares; that, in pursuance of said information, the assignees asked and obtained in their accounts credit for said shares; that before and after the failure of the Bank, the corporation defendant in writing informed the officers of the Bank that it was the owner of said one hundred and seventy-two and one-half shares; that there has been no interference of any sort or kind, since January, 1891, by the Delamaters or their assignees with the corporation defendant in the

possession and use of said shares; and that no demand has been made upon Delamaters since 1891 for the payment of their note for $15,000, and no admission by them has been made of any indebtedness thereon, you may find that prior to the failure of the Bank, there was a conversion by the defendant corporation to its own use of said shares of stock. If you find there was such conversion, you must find a verdict for the plaintiff."

9. That the said court erred in refusing to give to the jury at the trial of the above-entitled cause binding instructions for the plaintiff in error for the amount of his claim (upon the law and evidence), being the third point of charge requested by the plaintiff in words as follows, to wit:—

"3. You must find a verdict for the plaintiff for the amount of his claim."

10. That the said court erred in refusing to give to the jury the following instructions (being plaintiff's fourth point), requested at the trial of said cause by the plaintiff in error. The said fourth point being in words as follows, to wit:—

"4. If you find there was a deposit with the corporation defendant by the Delamaters of the two hundred and thirty shares of the bank stock with a blank power to transfer, as collateral security for their note of $15,000, with authority in the defendant corporation in case of default in payment of the note to sell the shares; this did not justify it, before it had made any

sale of the shares, after default, to cause the same to be transferred to W. W. Hand, if there was no agreement or consent by Delamaters or their assignees to such transfer."

11. That said court erred in refusing to give to the jury the following instructions (being plaintiff's fifth point), requested at the trial of said cause by the plaintiff in error. The said fifth point being in words as follows:—

"5. If you find that, prior to the failure of the Bank, defendant corporation asserted to the assignees and to the Bank that it was the owner of the shares; that the shares were transferred in January, 1891, into the name of Hand without the knowledge or assent of Delamaters or their assignees; that in 1895, or thereabouts, prior to the failure of the Bank, the corporation defendant, without the knowledge or assent of Delamaters or their assignees, caused proxies to be given by Hand, which were acted upon, to vote upon said shares in the election of directors and for the reduction of its capital; and that fifty-seven and one-half shares, without such knowledge or assent, were surrendered to the Bank by the corporation defendant, antecedently to the Bank's failure, then you may find a verdict for the plaintiff."

12. That the said court erred in giving the following instruction in its general charge to the jury, namely, that the whole subject is a question of fact and not of law. The contention of the plaintiff in error being

that the defendant is estopped by the evidence produced at the trial as a matter of law from denying its liability for the assessment.

13. That said court erred in giving the following instructions during the course of the charge to the jury at the trial of said cause, to wit, that without the knowledge, consent, or ratification of the Delamaters, Delamater & Co. or the assignees of Delamater & Co., said defendant corporation had the implied right, by reason of its holding blank powers to transfer the title of the shares of stock in question, to secretly transfer the same on the books of the Bank to the name of its own agent, retaining control thereof in itself, and to thereby create without the knowledge, consent, or ratification of the Delamaters or their assignees and without notice to the Bank, its own agent, a trustee for the Delamaters or their assignees.

14. That the said court erred in giving instruction to the jury at the trial of said cause during the course of the charge to the effect that the only question in the case was one of fact as to whether or not the said defendant was the real owner of the shares as distinguished from its being a pledgee of the stock, and that the registering of the stock on the books of the Bank by the defendant in the name of its agent, releases it from liability for the assessment in case the jury found that it held the same as pledgee and not as a real owner.

15. That the said court erred in giving the following

instruction during the course of the charge to the jury, to wit: "The burden of proof is upon the plaintiff to show, to prove to you by the fair weight of the evidence that the defendant was the real owner of this stock, and if you are unable to come to this conclusion, if the evidence is so balanced that you cannot reach that point, if your minds are unable to decide that the defendant was the real owner, then the plaintiff had failed, and your verdict must be for the defendant."

16. That the said court erred in instructing the jury during the course of its charge in all that portion thereof in which the court deals with the matter of the right of the defendant to put the stock in the name of Hand.

17. That the said court erred in giving the following instruction to the jury (being defendant's first point) requested by the defendant in error at the trial of said cause. The said defendant's first point being in words as follows, to wit:—

"1. A creditor who holds shares in a national bank as collateral security for an indebtedness of the real owner of the shares is not liable as a stockholder for an assessment made upon these shares by the Comptroller of the Currency under the provisions of the National Banking Act, even though such creditor has caused the shares to be transferred into the name of an employee, in whose name the shares are registered upon the books of the Bank at the date of the assessment."

18. That the said court erred in giving the following instruction to the jury (defendant's second point), requested at the trial by the defendant in error. The said second point being in words as follows :—

"2. The circumstance that Mr. Atherton, as an officer of the Fidelity Company, referred to that company as the owner of these shares in the correspondence had with the officers of the Keystone National Bank of Erie, does not of itself prove that the Fidelity Company was the absolute owner of the shares so as to render that company liable to an assessment as a stockholder, if the jury find from the correspondence between the same parties or other evidence in the case that the Fidelity Company in fact held the shares registered in the name of W. W. Hand as collateral security for a debt of Delamater & Company."

19. That the said court erred in giving the following instructions to the jury (being defendant's third point). The said defendant's third point being in words as follows, to wit:—

"3. The word 'owner' does not of necessity import absolute ownership—it can properly be used in reference to the title of one who is a pledgee in possession of personal property. The nature of the ownership is to be determined by all the evidence in the case."

20. That the said court erred in its answer to the defendant's sixth point as an instruction to the jury at the trial that "under all the evidence the verdict must

be for the defendant." That the said trial judge upon this sixth point of the defendant instructed the jury in answer to said point in words as follows, to wit:—

"That point is reserved. I shall put it in this form, 'the court reserves the question whether there is any evidence to go to the jury in support of the plaintiff's claim.'"

21. That the said court erred in refusing a new trial in said cause, and in holding "that the facts in this case do not differ materially from the facts in **Anderson vs. Philadelphia Warehouse Co.**, 111 U. S., 479."

Second.—The said Circuit Court of Appeals for the Third Circuit, before which was heard the writ of error which brought up the record in this action from the Circuit Court of the United States for the Eastern District of Pennsylvania to said Circuit Court of Appeals, erred in making its order on the twenty-ninth day of April, 1901, affirming the judgment of the said Circuit Court, and directing the mandate to issue to the said Circuit Court, directing that court to proceed in accordance with the decision and order of said Circuit Court of Appeals.

Third.—That the learned Circuit Court of Appeals for the Third Circuit erred in not making an order upon the law and evidence of the case reversing the judgment of said Circuit Court and directing the said

Circuit Court to enter judgment for the plaintiff in error and against the said defendant, The Fidelity Insurance, Trust and Safe Deposit Company, in the sum of $17,250 and interest thereon at six per centum per annum from December 3d, 1897, besides the costs, because—

(*a.*) That the evidence in the case equitably estops defendant in error to deny its holding and ownership of the one hundred and seventy-two and one-half Bank shares within the meaning of section 5151 of the Revised Statutes of the United States.

(*b.*) That the evidence in the case equitably estops the defendant in error to deny its liability as a shareholder to the creditors of the Bank within the meaning of section 5151 of the Revised Statutes of the United States.

(*c.*) That the voluntary act of defendant in error causing a transfer of the Bank shares on the books of the Bank from George B. Delamater and George W. Delamater to W. W. Hand, its authorized agent, to hold the same for its benefit, concealing said transfer from the Delamaters and their assignees, and without their knowledge, consent, or ratification, and without any notice at the time to the Bank of pre-existing pledge relations between it and the Delamaters so wronged and prejudiced the creditors of the Bank by thus discharging the Delamaters from all rights and liabilities as shareholders, under sections 5139 and 5151, Revised Statutes of the United States, that de-

fendant in error is equitably estopped to deny its liability as a shareholder to creditors within the meaning of section 5151 aforesaid.

(*d.*) That the voluntary act of defendant in error in transferring the Bank shares on the books of the Bank without consulting the Delamaters or their assignees, and without their knowledge, consent, or ratification, to W. W. Hand, its own authorized agent, thereby discharging the Delamaters from all liability as shareholders to the creditors and the authorized acceptance by its said agent, W. W. Hand, of a certificate therefor in his own name, for the purpose only of immediately transferring and assigning said certificate in blank to the defendant in error and the subsequent voting of the shares by said agent, by direction of the defendant in error, at meetings of the shareholders of the Bank, and its voluntarily voting the shares for and paying an assessment thereon when the capital of the Bank was impaired, and the continuous holding by it of the certificate for said shares, so assigned in blank that at any time they could be transferred on the books of the Bank into defendant in error's name, together with its admission to the Bank for the purpose of getting information that shareholders of the Bank only would be entitled to receive, that it was the owner and holder of the shares that stood in the name of W. W. Hand, and that the shares belonged to it and not to Hand, equitably estops defendant in error, when the Bank becomes

insolvent, to deny its liability as a shareholder within the meaning of section 5151 of the Revised Statutes of the United States.

(*e.*) That the evidence in the case equitably estops defendant in error to deny its conversion of all the rights of a shareholder in said one hundred and seventy-two and one-half Bank shares from the Delamaters to its own beneficial use, and its consequent liability as a shareholder within the meaning of section 5151 of the Revised Statutes of the United States.

(*f.*) That the defendant in error is equitably estopped from denying notice to it of the insolvency of the Delamaters prior to the transfer by it of the stock on the books of the Bank from the Delamaters to its own duly authorized agent, W. W. Hand.

(*g.*) That the evidence in the case equitably estops defendant in error to deny its right to receive dividends upon the one hundred and seventy-two and one-half shares, if any had been paid by the Bank, and to vote the shares through its duly authorized agent, W. W. Hand.

(*h.*) That all the evidence in the case equitably estops defendant in error to deny that it was the real and beneficial owner of the one hundred and seventy-two and one-half Bank shares within the meaning of section 5151, United States Revised Statutes.

(*i.*) The act of W. W. Hand in accepting the one hundred and seventy-two and one-half Bank shares,

and the certificate therefor, in his own name, and in holding himself out on the books of the Bank and on the list of shareholders as a shareholder of the Bank, was by direction of the defendant in error, and he acted entirely within the scope of his authority as its agent in so doing, and without the knowlege, consent, or ratification of the Delamaters, Delamater & Co. or their assignees, and his principal, the defendant in error, is equitably estopped by the authorized acts of its agent to deny liability as a shareholder within the meaning of Section 5151 of the Revised Statutes of the United States.

(*k.*) If W. W. Hand was pledgee simply of the one hundred and seventy-two and one-half Bank shares, their transfer to him on the books of the Bank, his acceptance of a certificate of ownership in his own name, the entry of his name on the list of shareholders, his voluntary payment of an assessment to make good impaired capital, and his voting the shares at meetings of shareholders, would equitably estop him to deny liability to creditors as a shareholder, under Section 5151 of the Revised Statutes of the United States; and if defendant in error were pledgee simply and W. W. Hand, within the scope of his authority as its agent, and by its direction, agreed to, and did, hold one hundred and seventy-two and one-half Bank shares in his own name without personal interest therein, and simply as representative and under direction of the defendant in error, and without any agreement be-

tween defendant in error or Hand and Delamaters or their assignees, or with the Bank, that the shares be held by Hand, as trustee, and without the knowledge, consent, or ratification of the Delamaters or their assignees, and without notice to the Bank of any pledge relation at the time of the transfer to Hand, defendant in error paying assessments to make good impaired capital, through its agent, and directing him as to voting the shares at the meetings of shareholders, and holding the certificate therefor duly assigned in blank, so that at any time the shares may be transferred upon the books of the Bank to defendant in error's name, the acts of the agent within the scope of his authority, equitably estop his principal, the defendant in error, to deny its liability to creditors as a shareholder, within the meaning of Section 5151 of the Revised Statutes of the United States, just as if the shares stood in its own name.

4. That the Circuit Court of Appeals for the Third Circuit erred in not sustaining the writ of error then before it, and in not reversing the judgment entered in this action in said court.

ARGUMENT.

Defendant in error is estopped to deny ownership of the one hundred and seventy-two and one-half shares to the insolvent Bank's creditors.

Defendant upon all the evidence in the case is estopped when Bank has become insolvent to deny responsibility of a shareholder, within the meaning of sec. 5151, Rev. Stat. U. S., for the one hundred and seventy-two and one-half shares held in the name of its agent, W. W. Hand, because during Bank's solvency it repeatedly and positively asserted that it was the true owner and assumed the rights, powers, and duties of a shareholder, exercising its right to divest the legal title thereto, from George B. and George W. Delamater to itself, in the name of its agent, and because it impressed upon the officers of the Bank by its representations, admissions, and conduct that it was the real owner of the shares, entitled to be paid dividends, to vote and exercise all rights of ownership, and that if Bank recognized Hand other than as agent of defendant to its detriment, the Bank would be liable, and so impressed was Bank by reason of these representations of defendant that it was in truth the real owner of the shares that in due course of business for its own protection and for the protection of its creditors and shareholders it entered the name of

defendant in its stock ledger over the name of W. W. Hand as owner, and this entry in the stock ledger, together with entries in the Bank's stock certificate book and letters of defendant to Bank stating that it was owner, were open to the inspection of the creditors of Bank, and from these books was made up the official list of shareholders, and because depositors (creditors) of Bank will be presumed to have given to Bank credit relying upon these representations, claims, and acts of defendant believing it to be the real owner, and it is estopped to deny ownership because of its negligence in not advising the Bank of its true relation to the Delamaters and to the stock, and it is immaterial to the estoppel if defendant now shows that it was not the real owner of the shares, but pledgee only. Its mouth is closed to now make this defense to the prejudice of creditors, thereby contradicting its avowal of true ownership made during solvency of Bank and upon which avowal the creditors relied.

ASSIGNMENTS OF ERROR RELIED UPON TO ESTABLISH ESTOPPEL.

"3. You must find a verdict for the plaintiff for the amount of his claim." (Page 154.)

And to the answer of the court to the sixth point of defendant asking for binding instructions in words as follows, to wit:—

"That point is reserved. I shall put it in this form, 'the court reserves the question whether there is any evidence to go to the jury in support of the plaintiff's claim.'" (Page 156.)

12. "That the said court erred in giving the following instruction in its general charge to the jury, namely, that the whole subject is a question of fact and not of law. The contention of plaintiff in error being that the defendant is estopped by the evidence produced at the trial as a matter of law from denying its liability for the assessment." (Page 154.)

The part of the charge objected to is in words as follows:—

"The whole subject, as I regard it, for the present at least, is a question of fact; and that question, I repeat, is whether the defendant company—the Fidelity Trust Company—was at the time when this Bank went into the hands of the Receiver, the real owner of these shares of stock, or whether it continued to hold them as collateral security for the payment of the note originally given by the Delamaters." (Pages 113, 114.)

And the refusal of the trial court to give to the jury plaintiff's first (pages 152, 153) and fifth (page 154) points.

15. That the said court erred in giving the following instruction during the course of the charge to the jury, to wit: "The burden of proof is upon the plaintiff to show, to prove to you by the fair weight of the evidence, that the defendant was the real owner of this

stock; and if you are unable to come to that conclusion, if the evidence is so balanced that you cannot reach that point, if your minds are unable to decide that the defendant was the real owner, then the plaintiff has failed, and your verdict must be for the defendant." (Page 155.) (Charge to jury, page 116.)

1. That the said court erred in refusing to permit counsel for plaintiff in error to introduce in evidence at the trial of said cause, an entry in the stock ledger of said Bank, over the name of W. W. Hand, in an account opened with said W. W. Hand, at the request of the defendant corporation, showing the holding and ownership of one hundred and seventy-two and one-half shares of the stock of said Bank, being the stock in issue in this case, and for the collection of the assessment ordered by the Comptroller of the Currency upon which the defendant is sued, the said stock ledger having first been admitted in evidence, the witness (Higgins), while testifying to the entries in said book was about to state that written over the name of W. W. Hand in the stock ledger of the Bank, in the hand-writing of its cashier, were the words "The Fidelity Trust and Safe Deposit Company, Phila., Pa.," that the entry there had been made in the regular course of business, and at the time the certificates, at the instance of the defendant, were issued in the name of W. W. Hand, pursuant to written instructions from the defendant corporation to the Bank; that it was the owner of the stock standing in the name of W. W.

Hand, and intending to follow the same up by showing that this book for many years, with this entry of the name of the defendant corporation written over that of W. W. Hand, together with letters from the defendant corporation stating that it was the owner of the stock, had been open to the inspection of the shareholders and creditors of the Bank long before its failure, and that the entry was made by the officer of the Bank for the purpose of advising the shareholders and creditors of the Bank of the information they had that the Fidelity Insurance Trust and Safe Deposit Company of Philadelphia was the real or beneficial owner of the stock which stood in the name of its agent, W. W. Hand. (Page 149.) (Testimony of George H. Higgins, pages 20, 21, 22. Testimony of Joseph I. Towne, pages 48, 49.)

That the said court erred in refusing to permit counsel for plaintiff in error to introduce in evidence at the trial of said cause the following testimony contained in the deposition of John O. McClintock, a witness produced upon behalf of the plaintiff and one of the assignees for the benefit of creditors in the deed of assignment made by Delamater & Co. (Testimony of John O. McClintock, pages 68, 69, 70.)

"Q. Did you make a further account in the matter of the assignment of Delamater & Co. as assignees? If so, state when and what, if anything, was said, to the best of your recollection, in that account in regard to the charge made against you on account of

the two hundred and thirty shares of stock of the Keystone National Bank, heretofore referred to in this deposition.

"A. On the 13th of July, 1896, we, the assignees of Delamater & Co., filed in the above-mentioned case our final account. In this final account we were charged with this item referred to in the question as follows: 'Equities in stocks and bonds pledged as collateral on loan unadjusted, as follows: (*a*) $23,000, stock of the Keystone National Bank of Erie pledged for the loan of the $15,000 appraised at $8000,' and we were credited with item No. 48 as follows: 'Accountants claim credit for the item of $23,000 Keystone National Bank stock pledged for loan of $15,000 charged at $8000.'" (The trial court admitted the testimony to this point, excluding what follows): "Said stock having been converted by the holder of the note and said stock having been assessed to the amount of twenty-five per cent. of its face value, did not sell for enough to pay the debt for which it was pledged."

"Q. Was this credit in your second and final account allowed by the court?

"A. It was. The account as filed was finally confirmed by the court.

"Q. Will you state when and where it is recorded?

"A. It was finally confirmed and allowed on the first Monday of August, 1896, and is recorded in the Account Book No. 1, at page 539 of Records of the Court of Common Pleas of Crawford County, Pennsylvania.

"Q. This final account of yours, as assignees of Delamater & Co., was filed, then, more than one year after your meeting with the defendant company on or about the 1st of May, 1895? What connection, if any, had that meeting with your statement in your account with reference to this account?

"A. In relation to this equity?

"Q. Yes.

"A. The statement made by us in our claim of credit for this item of $8000 was made from the information obtained by us in our interview with the officer of the defendant company on or about the first of May, 1895."

4. That the said court erred in refusing to permit counsel for the plaintiff in error to introduce at the trial the following testimony in the deposition of George W. Haskins, one of the co-assignees for the benefit of creditors of Delamater & Co. and a witness produced upon behalf of creditors of plaintiff in error as follows, to wit (testimony of George W. Haskins, page 82) :—

"Q. I hand you the final and last account that you filed in that assigned estate, and ask you to look at item No. 48 and refresh your memory in regard to it and state the matter therein set forth.

"A. In our final account, item No. 48, the accountants claim credit for the item of $23,000 Keystone National Bank of Erie stock pledged for the loan of $15,000 charged at $8,000." (The trial judge ad-

mitted this much of the answer, but refused to admit what follows in this answer and the following answers here quoted.) "Said stock having been converted by the holder of the note and said stock having been assessed to the amount of twenty-five per cent. of its face value, did not sell for enough to pay the debt for which it was pledged." This final account was allowed and approved by the Court of Common Pleas of Crawford County, Pennsylvania, in the matter of the assignment of Delamater & Co., entered to No. 52 February term, 1891.

"Q. When was the account finally confirmed?

"A. On the first Monday of August, 1896."

And the third assignment of error, (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), (*i*), (*k*). (Pages 156, 157, 158).

The refusal of the trial court to permit plaintiff in error (as shown by the first assignment of error, page 149) to show to the jury the entry of the name of defendant as a shareholder on the stock ledger of the Bank was clearly error, for no stronger evidence could have been produced to prove the impression made upon the Bank's officers by the representations of ownership made by defendant, and this book was open to the inspection of creditors and shareholders and from it the list of shareholders was made up.

The reasoning of counsel for defendant against the introduction of this evidence, which seems to have been adopted by the trial court, was, in brief, that the entry was irregular, it being written with a lead pencil in-

stead of with pen and ink, and that its irregularity was such that it was incompetent as evidence tending to prove the legal ownership by defendant of the shares and that the books were not evidence in themselves to establish the fact of ownership, against persons charged as stockholders. The court's ruling was in keeping with the view shown to be held by it throughout the entire trial, to wit, that it was necessary to prove that defendant was, in fact, the real owner of the shares; whereas the contention of the plaintiff in error was and is that it is not necessary to show that the defendant is in truth the real owner of the shares, but that it has made such representations and admissions and its conduct throughout was such that the Bank was impressed by it with the belief that it was the real owner of the shares; that it concealed everything that would lead to a contrary belief, and that the Bank was so impressed with the defendant's ownership of the shares that in the regular course of its business it did make a memorandum on its books, for its own protection, to the effect that Hand was simply an agent of defendant and that defendant was the true owner, and that this entry being made upon the book from which the list of stockholders was made up and a book, under the law, open to the inspection of the creditors and shareholders of the Bank, it will be presumed that the creditors relied upon the belief that the defendant was the real owner of one hundred and seventy-two and one-half shares of the Bank's stock and dealt with the Bank

upon the credit of the defendant, and that the defendant is now estopped to deny, when the Bank becomes insolvent and to the prejudice of depositors, that it is not the real owner of the shares. For this reason, in order to establish the estoppel, the entry is admissible as evidence, and it was error to exclude it.

In **Carey vs. Williams,** 79 Fed., 906 (1897), Wallace, C. J., delivering the opinion of the court, on page 912 says :—

> " The true ground upon which the books of a corporation, showing who are shareholders, are admissible in evidence is that they are the best evidence of the assent of the corporation to the contract of membership. Until that assent is proved, the contract is not complete, and no person who has bought shares of stock can be subjected to the liability of a stockholder. When it appears that a person has subscribed for or purchased shares, has voted upon them, has received dividends upon them, *or in any way has consented to occupy the relation of a stockholder,* the contract of membership on his part is shown ; and the stock books become competent evidence, because they show that the corporation has likewise consented."

The facts in the case at bar come within this ruling. The legal title to the shares was placed by defendant in the name of its agent, and through its agent it exercised all the rights of a shareholder, voting the shares, &c. It notified the Bank that it was the owner of the shares, thereby consenting to be a shareholder; the Bank accepted the defendant as a shareholder, and, in evidence of its consent, entered its name upon the

books. The evidence of this consent by the Bank was, therefore, admissible, for this reason as well as that already stated.

See, also—

Turnbull vs. Payson, 95 U. S. 418.

In Cook on Corporations (fourth edition), section 249, it is said :—

> "Sometimes a subscription for stock is made by one person as the agent for another, and the stock is entered on the corporate books in the name of the agent. In such a case it is the rule that corporate creditors may hold either the principal or the agent responsible on the stock. An agent who is compelled to assume and pay charges on the stock may recover from his principal the amount so paid. Where a transfer is made, not to the principal himself, but to the agent, the latter is but a nominal holder, and is subject to the rules applicable to such."

In Greenleaf on Evidence (Lewis' edition, 1896), vol. 2, sec. 59, it is said :—

> "An agent is one who acts in the place and stead of another. The act done, if lawful, is considered as the act of the principal. It is not always necessary that the authority should precede the act; it may become in law the act of the principal by his subsequent ratification and adoption of it. The vital principle of the law of agency lies in the legal identity of the agent and the principal, created by their mutual consent."

The refusal of the trial court to permit the witnesses John O. McClintock and George W. Haskins (assignees of Delamater & Co.) to testify before the jury

that their memory was refreshed and recollections confirmed as to the representations made by the officers of the defendant company to them on or about May 1st, 1895, by their own official report, in which was the following written statement, made by them as assignees, was error:—

> "Accountants claim credit for the item of $23,000 Keystone National Bank stock, pledged for loan of $15,000, charged at $8,000, said stock having been converted by the holder of the note, and said stock having been assessed to the amount of 25 per cent. of its face value, did not sell for enough to pay the debt for which it was pledged." (Pages 66 to 70, inclusive, 82, 83.)

Plaintiff in error duly excepted to this ruling at the trial, and his exception was noted, and the point is brought to this court by assignments of error Nos. 3 and 4. (Pages 150, 151.)

In Greenleaf on Evidence (Lewis' edition, 1896), section 436, it is said:—

> "Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and *assist his memory by the use of a written instrument*, memorandum, or entry in a book, and may be compelled to do so, if the writing is present in court. It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection. So, also, where the witness recollects that he saw the paper while the facts were fresh in his memory, and re-

members that he then knew that the particulars therein mentioned were correctly stated. And it is not necessary that the writing thus used to refresh the memory should itself be admissible in evidence; for, if inadmissible in itself, as, for want of a stamp, it may still be referred to by the witness."

The two hundred and thirty shares prior to March 1st, 1889, belonged to and stood in the name of George B. and George W. Delamater, who had executed blank assignments and powers, and sold, transferred and delivered them to Delamater & Co., and on March 1st, 1889, individually, the two Delamaters were not owners of the shares; they were the property of the firm of Delamater & Co. George B. and George W. Delamater, individually, owned no interest in the shares, at least after March 1st, 1889. Delamater & Co. delivered them by the same blank assignments and powers to the defendant, who held them as a pledge to secure the firm's note. Defendant knew that the shares belonged to the firm, and it held the shares under the blank assignments and powers made as aforesaid for nearly two years. When the firm, on December 5th, 1890, failed, it conveyed by deed all of its contingent interest in the shares to assignees for the benefit of creditors (pages 110, 111), and from that date Delamater & Co. had no further interest therein, because of its insolvent condition. The supposed equity of $8,000 passed to the assignees, Messrs. Haskins & McClintock. The bare legal title, however, still stood upon the books of the Bank in the names of

George B. and George W. Delamater, and, as holders of that legal title, they were entitled to vote the shares, to be paid dividends, and exercise all the rights of shareholders so far as the Bank was concerned; certainly, if no notice had been given to it that they were no longer owners, and there was no notice of any kind to that effect, they were, also, individually responsible to creditors, within the meaning of Section 5151, *supra*. The assignees of Delamater & Co., after December 5th, 1890, had only a contingent interest in the shares; it was subject to the claim of defendant in error; they never held the legal title on the books of the Bank, and, therefore, never had the right to vote and to be paid dividends, nor were they subject to the liability of creditors. Defendant had actual knowledge of the assignment by Delamater & Co., for, on December 17th, 1890 (twelve days afterward), it wrote a letter to the assignees. (Page 93.) When, therefore, on January 10th, 1891 (pages 34, 35), defendant made use of the blank assignments and powers controlling the shares (which it had heretofore held as pledgee) by writing in the blank space for transferee the name "W. W. Hand" (page 30), surrendering the certificates to Bank (pages 31, 34, 35) and taking from the Bank new certificates dated January 15th, 1891 (pages 36, 37, 38), it took to itself, in the name of its agent, the legal title to the shares, and divested George B. and George W. Delamater of the bare legal title which they had held to that time. On

January 15th, 1891, therefore, the defendant was not only pledgee, but it became mortgagee; it not only had the constructive possession of the two hundred and thirty shares as pledgee, but it held the legal title as mortgagee thereafter. It was not a question of turning over to the pledgor, upon payment of the note, the constructive possession of the shares, which it held by reason of the blank assignments and powers, and which holding made it in no wise responsible to creditors, but it became a question of re-conveying the legal title to the shares upon payment of the note, not to George B. and George W. Delamater (who, prior to 1889, had conveyed all their interest in the shares to Delamater & Co.), not to Delamater & Co. (who, by their deed of assignment, had conveyed all their interest in the shares on December 5th, 1890), but to George W. Haskins and John O. McClintock, assignees, for the benefit of creditors of the almost worthless estate of Delamater & Co. (who, under Section 5152, Revised Statutes, would not have been personally responsible to creditors).

In *Casey vs. Cavaroc*, 145 U. S. 467 (1877), this court says on page 477, "The difference ordinarily recognized between a mortgage and a pledge is, that title is transferred by the former and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge (Pothier, Nantissement 8) and if possession be once given up, the pledge as such is extinguished. The possession need not be actual, it may be constructive. In some cases such constructive delivery cannot be affected

without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that character. Such an assignment is necessary where a pledge is proposed in order to give the constructive possession required to constitute a pledge, and yet it formally transfers the title also. *In such a case there is a union of two distinct forms of security: that of mortgage and that of pledge; mortgage by virtue of the title and pledge by virtue of the possession.*"

If there was an equity in the shares, after payment of loan to defendant as before stated, it belonged to the assignees of Delamater & Co., who were never shareholders liable to creditors, not to Delamater & Co., certainly not to George B. and George W. Delamater, yet, as has been said, until January 15th, 1891, the bare legal title to these shares was registered in the name of George B. and George W. Delamater on the books of the bank, and until that date they had the legal right to draw dividends, vote the shares, and exercise all the powers of complete ownership and defendant alone had the power to take away these legal rights. It exercised this power by transferring this legal title on the books of the bank from them to W. W. Hand and by this act of defendant, all responsibility to creditors and all and every right of a shareholder was divested from them, and the Delamaters ceased absolutely from that moment to be responsible to creditors for the contracts, debts and engagements of the Bank, under section 5151, Rev. Stat., U. S., and defendant, to use language of

Mr. Justice Strong in **National Bank vs. Case** (*infra*) is liable because "by taking the legal title he has released the former owner."

It is important in this case to clearly fix upon whom the responsibility for this transfer fell. Who is now *holder* of these shares within the meaning of section 5151, *supra?* W. W. Hand, the agent, or defendant, his principal?

The fortunes of George B. and George W. Delamater, since the failure of Delamater & Co. (twelve years ago) may have so changed that the Receiver, if within six year limit of the Pennsylvania statute which began to run December 3, 1897, when assessment here sued on was ordered payable by Comptroller, might still recover from them, if this court decided upon the facts in this case, that they are still shareholders, liable to creditors, under sections 5139 and 5151 Rev. Stat., U. S., for **it is assumed that it is the intention of the National Bank Act in providing for this assessment that shareholders, solvent or insolvent, to the extent of every share of its capital stock, must be found for the entire assessment of $150,000,** and if George B. and George W. Delamater are not shareholders responsible to creditors, by reason of the transfer by defendant of January 15th, 1891, it is clear that creditors can look for payment to no other than defendant or W. W. Hand, agent. With this understanding the Comptroller and Receiver, acting for creditors, have elected to hold defendant as principal.

Attention is called to the importance of the fact that this act of the defendant in transferring the shares from the Delamaters to Hand was perfected before default in payment of Delamater & Co.'s note.

The defendant, without an express agreement (as there was in **Anderson vs. Philadelphia Warehouse Co.**, 111 U. S., 479, between pledgors, Bank and pledgee) was authorized because of its holding blank assignments and powers, to transfer shares on books of the Bank to its own name or that of its agent, and not otherwise, and could not, under the simple contract of pledge, sell the shares before default in payment of note. Defendant must, therefore, upon the facts in this case, be held to have put the shares in the name of W. W. Hand as its own agent, and the implied contract liability to creditors because of the holding, contracted by its agent, under Section 5151, *supra*, at the moment of transfer, attached to defendant as principal, and defendant is estopped when the Bank becomes insolvent to deny to creditors this responsibility of a shareholder, even though pledgee only.

In **Priestly vs. Fernie**, 3 Hurlston & Coltman's Rep. 977, in Exchequer of Pleas, the master of a ship was sued to judgment and after judgment was adjudged a bankrupt, and thereupon the plaintiff sued the owners of the ship for whom the master was agent, and the owners of the ship set up the judgment against the master as a bar to the action against them :—

It was held by the court "that the action against the owners was barred for the reason that the owners were liable to the master to indemnify him upon the judgment against him he having been elected by the plaintiff for suit, it being admitted that the plaintiff had the election to either sue the master or the owners, and it was held that if a judgment was now taken against the owners they would be held for the same claim twice, and that the principal applied even in case of a master of a ship. It was also held that this right to elect, as between the agent and principal applied only when the principal was undisclosed, but if the principal was disclosed by the agent, the right to sue the agent was not clear, the principal being the proper party to sue."

Bigelow on Estoppel (5th Ed.), 124.

In **Kingsley vs. Davis,** 104 Mass., 178 (1878), the plaintiff was a real estate broker who sold certain real estate at the instance of John J. Davis, supposing the title to be in him, whereas the title was in the name of his wife, The action was for commissions for making the sale; a judgment was taken by default against John J. Davis, but was uncollectible. Afterwards the fact appeared that he was not the owner of the property and an action was begun against his wife, Charlotte Davis. And the Supreme Judicial Court says on pages 179 and 180:—

"But the true inference to be drawn from the facts stated undoubtedly is that the plaintiffs contracted with and gave credit to John J. Davis, and they now claim that he was acting as the agent of the defendant, and that they gave him credit in ignorance of this fact. If we assume that he was acting as her agent in contracting with the plaintiffs, yet there is an insuperable obstacle

to their right to maintain this action. The general principle is undisputed that when a person contracts with another who is in fact an agent of an undisclosed principal, he may, upon discovery of the principal, resort to him or to the agent with whom he dealt at his election. But if after having come to a knowledge of all the facts he elects to hold the agent, he cannot afterwards resort to the principal. In the case at bar it is admitted that the plaintiffs, after all the facts became known to them, entered a judgment against John J. Davis upon the same cause of action for which this suit is brought (against his wife, Charlotte Davis.) We are of opinion that this was conclusive evidence of an election to resort to the agent to whom the credit was originally given, and is a bar to this action against the principal."

In the case now before the court the principal was disclosed to the Bank, its officers, shareholders, and creditors. It would have been hazardous, therefore, for the Receiver to undertake to hold the agent, Hand. It is questionable whether he could be held on the ground of estoppel, because the creditors knew that he was not the owner of the stock, and that defendant was the owner. We submit, therefore, that the only proper party for the Receiver to pursue for the collection of this assessment is defendant.

It is important to notice here that this transfer from the Delamaters individually to Hand was perfected two days before the maturity on January 17th, 1891, of Delamater & Co.'s note. This title could legally have been taken only by defendant itself or to its own agent, when done, as in this case, **before maturity of note and without the knowledge, consent, or ratifica-**

tion of George B. and George W. Delamater, Delamater & Co. or their assignees, and an agreement between them and the Bank, as in **Anderson vs. Philadelphia Warehouse Co.**, 111 U. S., 479, made at the time the contract of pledge was entered into.

These blank assignments and powers of the Delamaters were in the usual form (page 112), and the new certificates issued by the Bank for the two hundred and thirty shares were not delivered to the possession of W. W. Hand and never were in his custody, but were delivered to and always were in the custody of defendant (pages 25, 26), **it being noted on the stubs of the Bank's stock certificate book "Sent to the Fidelity Insurance, Trust and Safe Deposit Co., of Phila., Pa. 1/17/91."** (Pages 36–40). W. W. Hand, at the request of defendant, immediately executed an assignment and power in the same form as that afterward executed February 10th, 1893. (Page 112). We submit, therefore, that if it was the intention of the defendant to take title to the shares before maturity of the note, except to itself, it was a conversion of the shares. **There is absolutely no evidence that Hand was or is an irresponsible person financially, nor that defendant had any fear whatsoever of the responsibility of a shareholder consequent upon holding the stock in its own name**; it was a corporation; it was more convenient to have it in the name of an agent, and all defendant's subsequent conduct, representations, and acts conflict with the thought that its purpose in taking title to the shares in the name of Hand

was because of any fear of responsibility to the Bank's creditors. The stock was considered worth par—$8000 more than the loan. The Bank for about twenty-seven years had paid regularly semi-annual dividends. (Pages 50–53). It was the time of the year when a dividend was due, **and in fact on January 13th, 1891** (page 50), three days after the surrender of the Delamater certificates by the defendant and two days before the transfer was completed and new certificates issued, one was declared of two per cent. (on two hundred and thirty shares amounting to $460) ; it does not appear that this dividend was paid to defendant nor to the assignees, **but it is fair to presume from all the evidence that the object of defendant in making this sudden transfer of the legal title to its agent, Hand, was to control the dividends and vote the shares.**

In **McAllister vs. Kuhn** (1877), 96 U. S., 87, Mr. Chief Justice Waite, delivering the opinion of the court, says on page 89 :—

> " In this case the complainant alleges a wrongful conversion by McAllister to his own use of certain shares of the capital stock of a foreign corporation owned by Kuhn, which were represented by certificates of stock that had come into the possession of McAllister. There can be no doubt that shares of stock in a corporation may be transferred by means of an assignment and delivery of certificates. It is true that a certificate of stock is not the stock itself; but it is documentary evidence of title to stock, and may be used for the purpose of symbolical delivery, as the stock itself is incapable of actual delivery.

A blank indorsement of a certificate may be filled up by writing an assignment and power of attorney over the signature indorsed, and in this way an actual transfer of the stock on the books of the corporation may be perfected. A wrongful use of such an indorsed certificate for such a purpose may operate as a conversion of the stock."

On May 5th, 1891, defendant wrote to assignees of Delamater & Co., at Meadville, Pa., as follows:—

"PHILADELPHIA, May 5th, 1891.

"*Assignees of Delamater & Co., Meadville, Pennsylvania.*

"GENTLEMEN: I herewith enclose a copy of a note addressed this day to Delamater & Co. As the business concerns you as their Assignee I trust you will be able to settle the note and avoid the necessity of selling the collateral.

"Yours resp'ly,

"R. PATTERSON,

"*Vice President.*"

Accompanying this letter was one dated the same day, reading as follows:—

"PHILADELPHIA, May 5th, 1891.

"*Messrs Delamater & Co., Meadville, Penn'a.*

"GENTLEMEN:—I have to renew the call heretofore made on you for payment of your note of $15,000 dated Nov. 15, 1890, due at sixty days. The time expired Jan. 17th, last. The note carries 6% interest from its date. It is secured by 230 shares of the Keystone Na. Bank of Erie, and if we cannot secure payment, for the note and interest *I have to notify you that we shall proceed to sell the collateral at auction.*

"Yours respectfully,

"R. PATTERSON,

"*Vice-Pres't.*"

(Page 71.)

Attention is called to the following statements in this letter: **"As the business concerns you as their Assignee, I trust you will be able to settle the note and avoid the necessity of selling the collateral." "And if we cannot secure prompt payment for the note and interest I have to notify you that we shall proceed to sell the collateral at auction."** R. Patterson, who wrote this letter, was then vice-president of defendant; he has not been connected with defendant for many years and could not be obtained to testify. Charles Atherton before the trial was paralyzed and, being spechless, could not testify. It is claimed by plaintiff in error that this notice to the assignees given by defendant on May 5th, 1891, of intention to sell at auction, when at a public sale they may have had the right, under the collateral agreement, to buy the shares, **shows the intention of the defendant so to do, and defendant failed to show in this case that such formal sale at auction had not been made at the instance of either Mr. Patterson or Mr. Atherton** for account of defendant shortly after May 5th, 1891, and that a change in title was unnecessary as already the shares stood in the name of defendant's own agent.

The testimony of Mr. Gest refers to the efforts of the defendant to sell the shares at private sale and does not relate to a former formal sale at auction that might have been made at the instance of Mr. Patterson or Mr. Atherton, who had full charge to perfect title in the defendant. It is claimed further that this letter of May 5th, 1891, written by defendant to as-

signees of Delamater & Co., **bears intrinsic evidence that four months after transfer of title to Hand, defendant claimed full control of the shares and notified assignees of its intention to sell at auction, thus showing that Hand's holding was considered by defendant its own.** It is also important in this connection to note that **the transfer of the shares to Hand was concealed from the assignees in this letter,** and, indeed, it was concealed at all times from them until defendant was pressed by the assignees for a definite answer on or about May 1st, 1895, four years later.

On July 7th, 1892, defendant wrote the following letter to assignees of Delamater & Co. :—

"PHILADELPHIA, JULY 7th, 1892.

"GENTLEMEN :—We acknowledge the receipt of yours of July 6th and herewith enclose to you a copy of a letter which we have this day addressed to F. P. Ray, Auditor.

"Yours, truly,

"R. PATTERSON,
"*V. Prest.*

"*To Messrs. Geo. W. Haskins & John O. McClintock, Att'ys of the Assigned Estate of Delamater & Co., Meadville, Pa.*"

The letter inclosed the original which was addressed to Mr. Ray, and reads as follows :—

"PHILADELPHIA, July 7, 1892.

"DEAR SIR :—At the suggestion of the Assignees, we send you statement of our claim against the assigned estate as follows :—

"Note of Delamater & Company drawn to our order

for Fifteen Thousand Dollars dated November 15th, 1890, payable sixty days after date. As collateral security for the loan, we hold Two hundred and thirty (230) shares of the Keystone National Bank of Erie.

"Of this note we enclose herewith a copy.

"If any further proof of our claim is required, Please advise us and we will endeavor to comply with your request. I am,

"Yours very truly,

"R. PATTERSON,
"*V. Prest.*

"*To F. P. Ray, Esq., Auditor of the Assigned Estate of Delamater & Company, Meadville, Pa.*"

(Page 74.)

This letter was also written by R. Patterson, vice-president, and in it the fact of the transfer to Hand, one and one-half years before, is concealed. This last letter relates to a proof of defendant's claim against the assigned estate of Delamater & Co. in order that they may be paid the dividend. This dividend, $795.60, was paid March 30th, 1893. (Page 76.) It was for $5\frac{6}{10}$ per cent. (Page 73.)

These two letters of May 5th, 1891, and July 7th, 1892, **are convincing evidence that defendant regarded Hand as its own agent for the holding of the shares,** for, although written four and eighteen months, respectively, after the transfer to Hand, on January 15th, 1891, defendant conceals that fact from the assignees and holds itself out to them as being still the holder of the shares, for in the first letter it says: **"I have to**

notify you that we shall proceed to sell the collateral at auction;" and in the second it says: **"As collateral security for the loan, we hold two hundred and thirty shares of the Keystone National Bank, Erie."**

It will be noted that while defendant, in its letters to Delamater & Co. and their assignees, concealed the fact of the transfer to Hand, in its letters to Bank it concealed the pledge relation between Delamater & Co. and itself, and affirmed its ownership of the shares. The purpose is apparent, for, if it were known to the assignees that the shares had been converted by defendant to its own use, objection might have been raised as to any payment of dividends to defendant upon the note in the distribution of the assigned estate, and, indeed, an action might have been brought by the assignees against defendant for damages for its conversion, and if it had been known to Bank that defendant held the shares as pledgee only, the Bank might have questioned the right of defendant to vote the shares, and to be paid dividends, and receive statements of its financial condition and other information in regard to its management, to which shareholders only were entitled.

This is an action at law, and the use of the term "equitable" estoppel in the assignments of error is, technically, perhaps, incorrect. **The estoppel upon the facts in this case is an estoppel at law;** it is not an equitable defense in any sense, although, in the practice in Pennsylvania, "equitable

estoppel" and "estoppel *in pais*" are commonly used where estoppel at law is meant.

In **Kirk vs. Hartman** (1870) 63 Pa. St., 97, it is *held*—

> "If one holds himself out, or knowingly suffers himself to be held out as a partner, on the faith of which others trust or enter into a contract with the firm, he is responsible, although not a partner."
>
> "Estoppels shut the mouth of a party, whether his original act or declaration was intended to deceive or not."

And, on page 106, Mr. Justice George Sharswood says in his opinion:—

> "The eighth error assigned is to the instruction "that if Mr. Bailey induced plaintiff to believe that he was the partner of Hartman in this transaction, he is now estopped from denying the partnership." Nothing certainly is more firmly established than that if a man holds himself out, or knowingly suffers himself to be held out, as a partner, on the faith of which others trust to enter into contracts with the firm, he is responsible, whether he is in point of fact interested as a partner or not: Collier on Partnership, Section 86. It is not important for what reason the rule was established. It was, says Mr. Collier, 'upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it to only two of them, to whom, without the others, they would have lent nothing.' It may, however, very well stand upon the ground of estoppel. All estoppels shut the mouth of the party, because it would be a fraud in him to speak, whether his original act or declaration was intended to deceive or not."

This case is interesting, because the representations made were by letters, and in the letters there was no positive representation of partnership, but the court held that that conclusion was the only one fairly to be drawn. In the case at bar the representation of ownership of the shares was positive.

Morawetz on Private Corporations, vol. II., section 870, states the relationship between shareholders and creditors as follows:—

> "If the company's charter provides that the shareholders shall be subject to a special individual liability to creditors, persons becoming shareholders agree to become liable, both in a corporate capacity and individually, to all persons who shall give credit to the corporation. They offer to all the world to become liable in their corporate capacity to the extent of the capital which they have agreed to contribute for the purpose of carrying on the company's business, and they offer to become liable individually to the amount expressly provided by their charter or incorporation law. Parties who contract with the corporation contract upon the faith of this liability held out as their security; and the offer of the shareholders, being thereby accepted, ripens into a binding contract."

In **Hobart vs. Johnson,** 8 Fed. Rep., 495 (1881), Blatchford, J., says:—

> "Every creditor of the bank, becoming such, becomes, *eo instante*, a creditor of the shareholder in respect to the liability in question. The shareholder becomes thereby a principal debtor. The debt of the bank is his debt at the instant of its creation, and the debt of the bank is re-

ferred to only as a measure of the debt of the shareholder. * * * The idea of guaranty or suretyship, or of a promise to pay the debt or answer for the liability of another, is altogether destroyed by the fact that the debt of the bank is incurred for the benefit of the shareholders exclusively, and is thus the debt of the shareholder as a principal."

In **Langtry vs. Wallace,** 97 Fed. Rep., 867 (1899), the court says:—

"All persons are, in law, presumed to extend credit to corporations, and especially to national banks, whose shares are subject to a double assessment, in reliance upon the amount of their issued capital stock, although they do not know accurately by whom such stock is at the time held."

In **Upton vs. Englehart,** 3 Dill., 496, Fed. cas. No. 16,800 (1875), the court says:—

"If a person has accepted a certificate of stock, and becomes, to all external appearances, a stockholder, persons may have become creditors of the company on the faith of his membership, and in law are presumed to do so."

In **Schalucky vs. Field,** 124 Ill., 617 (1888), the charter of the Illinois Bank provided that—

"When default shall be made in the payment of any debt or liability contracted by said corporation, the stockholders shall be held individually responsible for an amount equal to the amount of stock held by them respectively, &c."

The court says :—

"The stockholders, with respect to their personal liability under such a provision as section 9, are, in effect, partners, and are liable, as such, to the creditors of the corporation to an amount equal to the amount of stock held by them respectively. The stockholders in the German Savings Bank assumed a primary liability to the creditors to pay the indebtedness of the bank to the amount stated in section 9. When a debt was contracted by the bank, the liability of those who were then stockholders, attached, and from that moment they became bound in the same manner and with like effect as if they had been doing business as partners unincorporated, except that the liability of each stockholder was limited to an amount equal to the amount of stock held by him."

In **Sawyer vs. Hoag**, 17 Wall., 610 (1873), Mr. Justice Miller clearly defines how the contract between the creditor and stockholder should be viewed. He states :—

"After all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is, therefore, but just that when the interest of the public, or of strangers dealing with this corporation, is to be effected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to a rigid scrutiny, and if found to be affected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him."

It is urged by defendant's counsel that the following expressions found in defendant's letters were actual notice to the Bank that it held the shares as pledgee only :—

In that of April 4th, 1894 (page 108)—

> "As we have a loan of $22,000 depending on the value of 172½ shares, we desire the above information."

March 17th, 1897 (page 46)—

> "We are anxious to sell the stock to close an account."

March 20th, 1897 (page 108)—

> "We wish to close the account for which this is collateral."

April 8th, 1897 (page 108)—

> "We are anxious to sell this stock to close an account."

Taking up the letters in the order just quoted, the first one was written more than three years after issue on January 15th, 1891, of the certificates for two hundred and thirty shares into the name of Hand and not the slightest word had been spoken to the Bank of a pledge relation between Delamater & Co. and defendant by any one, and no such word is spoken in this letter of April 4th, 1894. The part quoted may mean that a loan was then in contemplation, and this letter must be construed with that written by defend-

ant a few days before on March 20th 1894 (pages 32, 33), in which it is stated by defendant:—

> "This company holds 172½ shares of your Bank registered in the name of W. W. Hand. * * * We would like to sell our holdings, if marketable."

The letter of April 7th, 1894, of the Bank in reply (page 107) shows that it had no other thought than that defendant owned the shares.

The three letters of March 17th and 20th, and April 8th, 1897, are practically one letter; they were written more than six years after the original transfer to Hand, and more than four years after the issue of the reduced number of shares to Hand (Certificate No. 236, page 112). The Bank's cashiers had been changed two or three times, and the president had been changed. During all that time not one word had been spoken to the effect that Delamater & Co. had borrowed of defendant, and that the shares were in pledge. This fact had been concealed. Defendant had paid the assessment because of the impaired capital; it had voted for a reduction of capital, and accepted a reduced number of shares in lieu of the two hundred and thirty shares. In the letter of April 8th, 1897, the defendant says, "Since we have held the stock, we paid an assessment and the number of shares reduced." There is nothing in the letters of March 17th and April 8th, 1897, that would indicate a pledge, but the contrary; the statement is the

same in both. "We are anxious to sell this stock and close an account." The statement in the letter of March 20th, 1897, "We wish to close the account for which this is collateral" only needs attention. The letter in full is as follows:—

> "*This company owns 172½ shares of the stock of your Bank registered in the name of W. W. Hand. We would be much obliged for any information you can give us in regard to the business of the Bank or a copy of the last statement to the Comptroller. Has there been any sales of the stock within the last year? If so at what price.* We wish to close an account for which this is collateral. *If you can put us in the way of finding a customer we will pay you the usual commission.*"

The letter of March 17th, 1897 (three days before) (page 46), says:—

> "This Company owns 172½ shares of stock of your bank, registered in the name of W. W. Hand. * * * We are anxious to sell the stock to close an account. If you can put us in the way of finding a customer we will pay the usual commission."

And the letter of April 8th, 1897 (page 108) (nineteen days after), which was a summary of letters of 17th and 20th March, 1897, was as follows:—

> "March 17th I addressed a note to F. V. Kepler, supposing he was still cashier of your bank. He said he was not connected with the bank, and referred me to you. *On March 20th I wrote you this Company owns 172 1/2 shares of the stock of your bank registered in the name of W. W. Hand.* Since we have held the stock we paid an assessment and the number of shares reduced. We

have no knowledge of the bank's affairs. We would like to have a copy of the last statement to the Comptroller and any other information in regard to the business of the bank you will give us. Are there any market for the stock and at what price? We are anxious to sell this stock to close an account. If you can put us in the way of selling the stock *we will pay a commission.*"

And the letter written by the Bank in reply to this group of three letters shows that the Bank was impressed only by the assertion of defendant's ownership of the shares and its desire to sell them, and it shows clearly that it had no knowledge or suspicion that the shares were held simply as pledge. That letter of date April 14th, 1897 (page 107), is as follows:—

"Enclosed *find report of this Bank March 9th, 1897.* As regards sale of the stock, I think there would be a poor chance at the present time. Since our trouble of several years ago we have made no dividends, the condition of business being such that it has not been advisable to do so. Business is picking up in this locality. Should it continue we will get our share of it and be able to make dividends. Now, then will be a chance for a sale of stock. I will keep this matter in mind, and should I find a chance for a sale will let you know. I have been out of the City, thus the delay in answering yours of the 8th."

In two of the letters defendant says, in effect, to the Bank: We own one hundred and seventy-two and one-half shares, Hand is our agent. "We are anxious to sell the stock to close an account," a commission will be paid if you find us a purchaser. It is silent,

utterly silent, as to what the "account" is; it may have been an investment of defendant and the "account" is charged with the purchase price paid for the shares and would be "closed" by their sale. This would be the most likely interpretation of the meaning of the words; now, the other letter said in effect, We own the one hundred and seventy-two and one-half shares; Hand, in whose name they stand, is our agent. You must not transfer them without our knowledge and consent. "We wish to close the account for which this is collateral," a commission will be paid to you if you find a buyer. Here is the same expression, "We wish to close the account;" what account? The account showing our investment in the shares; we have charged these shares in an account with the price paid by us for them, and the shares are collateral to that account, and their sale is the only way to close it. Can that letter be construed otherwise by a Bank wholly ignorant of any pledge of the shares by Delamater & Co., made six years before to defendant? The evidence is all against any different view. See testimony of Matthew Griswold, the Bank's president (pages 60, 61), and that of Joseph I. Towne, the Bank's old cashier (pages 54, 55), and, showing the Bank's good faith; the name of defendant was actually entered in its books, by its cashier, as owner of the shares (pages 49, 59), and defendant, by its letter of October 14th 1897 (page 33)—after the failure—ratifies this view,

for it says, "The stock in the name of W. W. Hand belongs to this company." More, defendant's counsel conceded that the bank was absolutely ignorant of any pledge relation in its cross examination of witnesses Towne and Griswold. (Pages 54, 55, 60, 61.)

Bouvier defines estoppel as follows :—

> "An estoppel is the preclusion of a person from asserting a fact by previous conduct, inconsistent therewith on his own part, or the part of those under whom he claims."

Bigelow on Estoppel (fourth edition), 445, gives the following definition :—

> "Estoppel in *pais* may be defined to be a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged."

In the case of **Lewis vs. Carstair** (1843), 5 Watts & Sergeant's Rep., 205 (Pa.), which was a case at law (trespass), the court says, on page 209 :—

> "Whether an estoppel results from established facts is a question for the determination of the court, and the judge seems not to have gone far enough in submitting the question of equitable estoppel, so to call it, to the jury."

Again :—

> "As it can never appear whether a purchaser has been actually prejudiced by such acts, the possibility of injury to him is enough to raise an equitable estoppel by operation of law. His opponent is estopped from denying the right on whose existence he gave the purchaser reason to confide."

In **Turnipseed vs. Hudson** (1874), 50 Miss., 429, held—

"To establish estoppel *in pais* there must be:—

"1. An admission inconsistent with the evidence offered to be given or the claim offered to be set up.

"2. Action by the other party upon such admission.

"3. Injury to him by allowing the claims to be disproved. 14 Mo., 482."

Tarbell, J., delivering the opinion of the court, on page 435 says:—

"The propriety of this course is confirmed from the fact that estoppel *in pais* depends upon evidence and not upon the pleading.

"*Herman on Estoppel*, 560.

"*Bigtow on Estoppel*. 590.

"*Alexander vs. Walter*, 8 Gill, 240."

In **Mayer vs. Ramsey** (1876), 46 Texas, 271, *held*—

"An equitable estoppel may be proved under a plea 'not guilty' in trespass to try title."

In **Coleman vs. Pearce** (1879), 26 Minn., 123, *held*—

"Matter constituting an estoppel *in pais* need not be proven as such to enable a party to take advantage of the estoppel on the trial.

"*Caldwell vs. Augur*, 4 Minn., 156."

In **Vermont Copper Mining Co. vs. Ormsby** (1874), 47 Vt., 709, Barrett. J., delivering the opinion of the Court, on pages 713, 714, says:—

"If the purpose is to effect the legal title of Mr. Ormsby by equitable estoppel, that is as available in a court of law as in a court of equity. The kind of estoppel urged by the argument is only such as is familiar in courts of law as *estoppel in pais* in a court of equity. The purpose sought to be served by it in this instance, does not warrant resort to a court of equity."

In **Barnard vs. German American Seminary** (1882), 49 Mich., 444, it is *held*—

"Estoppels *in pais* are called equitable because they arise on facts that make their application just, and not because they are in any way limited to cases in equity; they are just as applicable in courts of common law."

In **Paxson vs. Brown** (1894), 27 U. S. App., 49, *held*—

"One who, by his acts or by his silence, when he ought to speak, intentionally or negligently induces another to believe certain facts to exist, and the latter acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby estopped from interposing such denial."

When the name of "W. W. Hand" was inserted by defendant in error in the blank assignments and powers, on January 10th, 1891, it was actually known to defendant that the only interest, other than its own, in the shares, was in the assignees for the benefit of creditors of Delamater & Co. **These assignees were trustees, acting under an order of court; whether trustees or not, they should have been notified of the transfer to Hand; but it was carefully concealed**

from them by the defendant in error, and the transfer to Hand was without their knowledge, consent, or ratification. (Pages 66, 67, 77, 81, 82, 87 to 92, inclusive, 96, 97.) It will be presumed that the purpose of concealment was to receive dividends from the assets of the assigned estate of Delamater & Co., for, if the assignees had known that this title to the shares had been taken by defendant and put in the name of its agent, dividends on defendant's claim against the assigned estate would have been refused; and, indeed, an action might have been maintained, at that time, by the assignees for damages for conversion of the shares, before default in payment of the note.

On March 16th, 1892, the Comptroller found that the capital of the Bank ($250,000) was impaired, and gave notice to the Bank, under section 5205, Revised Statutes, that in order to restore the capital, an assessment of twenty-five per cent. was necessary. This section, and amendment to it, reads as follows:—

> "SEC. 5205. Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, *by assessment upon the shareholders pro rata for the amount of the capital stock held by each;* and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until

otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four.

"SEC. 4 of the act of June 30, 1876, provides that if any shareholder or shareholders of a bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto) to make good the deficiency; and the balance, if any, shall be returned to such delinquent shareholder or shareholders."

By the provisions of this section and the amendment thereto, the payment of the assessment by the shareholder is voluntary and the only penalty for refusal or neglect to pay is a sale of a sufficient amount of stock necessary to meet the assessment of such shareholder at public auction after thirty days' notice.

In **Hulitt vs. Bell,** 85 Fed. Rep., '98, it is *held* :—

"An assessment to restore impaired capital under Revised Statutes, section 5205, is only enforceable by subjecting the stock of persons refusing to pay, and no action will lie against the stockholders personally."

The defendant in error elected therefore without the knowledge, consent or ratification of the assignees of

Delamater & Co. (its act being concealed from them) to voluntarily pay this assessment and $5750 (twenty-five per cent of $23,000, the par value of two hundred and thirty shares) was paid by it through Hand on September 16th, 1892. (See letter, page 54). It might have been better to have permitted the shares to be sold to pay the assessment in 1892. The Bank knew who paid it, because it was by defendant's check and because the president of the Bank, Mr. Griswold, had called at defendant's office and consulted with its officers in regard to the payment (page 61), and more, the Bank was informed by defendant in its letter of April 8th, 1897. (page 108), that the payment through Hand was its own act, for it says: "Since we have held the stock we paid an assessment and the number of shares reduced."

Defendant voted the shares through Hand, authorizing him to give proxies. (Pages 30, 31, 50, 52, 53, 54). On December 2d, 1892, defendant, through Hand, voted the shares in the affirmative of the proposition to reduce the capital stock $50,000 by the cancellation of that amount of stock held by the Bank and for a further *pro rata* reduction of twenty-five per cent., so as to leave the capital stock of the Bank $150,000. (Pages 52–53.) This reduction of the capital stock was made pursuant to section 5143, Revised Statues, which is as follows:—

> "SEC. 5143. Any association formed under this Title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the

amount required by this Title to authorize the formation of associations, but no such reduction will be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereto obtained."

This vote and act of the defendant in error, like all others, was without the knowledge, consent, or ratification of the assignees, who were thereby materially affected and was concealed from them, and it was known to the Bank to be the act of defendant, because Mr. Griswold, its president at the time, consulted with it in regard to the reduction of capital (page 61), and because the voting by Hand was confirmed and ratified by defendant in error in its letter to the Bank of April 8th, 1897. (Page 108.) Was not this conduct of defendant sufficient to cause the Bank to believe that it was the real owner of the shares and to justify the Bank's cashier in writing its name as owner of the shares in the stock ledger? (Pages 20, 21, 22. First assignment of error, page 149.)

The evidence is uncontradicted that about May 1st, 1895 (two years before Bank's failure), defendant in error told assignees of Delamater & Co. that it owned the one hundred and seventy-two and one-half shares transferred to Hand. John O. McClintock, Esq., one of the assignees, testifies:—

"We made known the object of our call, and this gentleman, whose name I do not recall, but who was repre-

sented to us to be an officer in charge of this matter, then stated to us that the certificates of stock which had been pledged by Delamater & Co. had been surrendered and that new certificates had been issued *to defendant company* in the name of W. W. Hand, an employee of the company. He also stated that an assessment had been called of twenty-five per cent. on this stock; that the stock had been reduced twenty-five per cent. and surrendered in pursuance of that call. That in addition thereto the defendant company had paid an assessment of twenty-five per cent. on the balance; that the assessment so paid had been paid, I think he said, in 1893; *that they owned the balance of the stock.* Having learned this much from the officer of the company we saw at once that there was no prospect of recovering from the stock for the creditors of Delamater & Co."

(Page 66. See also pages 65 to 76.)

George W. Haskins, Esq., the other assignee, testifies:—

"We called to adjust, if we could, the account and take up the stock. We were then informed by this gentleman, to whom we were referred and who was in the office, that the stock was transferred to Mr. Hand. Also that there had been an assessment on it of twenty-five per cent. which they had paid or arranged to stand—paid I think he said—and that in his opinion the stock was not worth the indebtedness, and we failed to make any arrangement with him." (Page 80.) "Yes; it was a surprise to learn that they had transferred it to anybody. In their communications to us on the subject the transfer had not been mentioned and we assumed that the stock remained as it was. That was our understanding when we went there." (Page 81.) "Neither of us authorized it" (the transfer to Hand, payment of assessment, and acceptance

of reduced number of shares), "or knew of it or consented or ratified it. We knew nothing about it at all. The conversation to which I referred above at the banking office of the defendant company was the first information or knowledge we had of it."

(Page 82.)

"Q. State whether or not the officer of the defendant company, whom you stated you thought was the vice-president of the company, stated to you at the meeting just referred to, that this stock was the property of the company.

"A. *He said it was;* that it had been transferred to Mr. Hand. He gave the information as an employee of the company; I do not know that he said anything more on the subject than as I have stated." (Page 82.) "It was upon his information that we based our application for the credit of $8000 in our final account (stating that the stock had been converted by the holder of the note, and said stock having been assessed to the amount of 25% of its face value, did not sell for enough to pay the note)." "That is the way he advised us, and our knowledge afterward concerning the deficiency of stock. There was a distinct statement by the officer at the time that it was not worth the face value of the note. And we understood from him that it had been converted."

(Page 83. See, also, pages 78 to 85.)

The assignees of Delamater & Co., as we have seen, were the only ones who had any possible interest in the shares, other than defendant, and defendant asserted its ownership to the shares to them, and, acting upon its representations, the assignees filed their final account, stating therein that the stock had been

assessed and converted and did not sell for enough to pay the debt, thus publicly abandoning forever all interest therein. **This final account of the assignees was confirmed by the Court of Common Pleas of Crawford County, Pennsylvania, on the first Monday of August, 1896 (a year before the Bank's failure). All interest in the shares of the assignees by this action, duly confirmed by the court, was forever ended, for the assigned estate paid but six per cent. of claims against it (page 73), and thereafter no one had any legal, equitable, real or beneficial interest in the shares except defendant.** When, therefore, defendant wrote to Bank, after this final account had been confirmed and the assignees discharged, in March, April and October, 1897 (pages 46, 108), it will be presumed—with full knowledge of the hopeless bankruptcy of Delamater & Co., and the final discharge of the assignees, and the consequent knowledge that every interest in the shares, other than its own, had been absolutely wiped out—that defendant intended to represent that it was the real owner of the shares when it said in its letters, "This company owns one hundred and seventy-two and one-half shares of stock in your Bank, standing in the name of W. W. Hand," and "The stock in the name of W. W. Hand belongs to this company," **and the Bank, its creditors and shareholders, as well as its officers, had the right to rely upon these representations, and it is impossible to say that the creditors were not prejudiced thereby, and the mouth of defendant, after failure of the Bank, is shut to now contradict its**

statement in an action by the Receiver for the collection of the assessment.

The registry of the shares on books of Bank by defendant in error in name of W. W. Hand, its agent, in contemplation of law, was a registry upon the facts in this case in its own name, and closes its mouth to contradict ownership just as if its own name had been registered. This is because of the legal identity of agent and principal.

In **Hubbell vs. Houghton** (1898), 86 Fed. Rep., 547, Putnam, J., delivering the opinion of the court, on page 533 says:—

> "Having come to this conclusion with reference to instances where shares of stock had been actually sold, the case for the plaintiff seems stronger, under the circumstances at bar; here there was no sale as between the holders of record and the defendant (Houghton); they (the holders) had been his agents, and, for all the purposes of this case, they were substantially the same as he; and, as against the rights of the creditors of the bank, the fact that the stock stood in their names, and not in his, on the books of the bank, ought to be regarded as of the very least importance."

And on page 548 says:—

> "The shares of the capital stock of the National Banking Association involved in this litigation were never entered on the books of the association in a way which would indicate ownership of them by the defendant. Nevertheless, when they were acquired by the parties in whose names they appeared on its books at the time it became insolvent, they were acquired by them as the agents of the defendant, and from the time they were

acquired the substantial proprietorship had always been in the defendant and the defendant had always held the corresponding stock certificates so indorsed that it was in his power to have the shares properly registered in his name at any time."

This case went to the Circuit Court of Appeals, for the First Circuit on error, 91 Fed. Rep., 453, and Aldrich, J., in delivering the opinion of that court, on page says :—

"It is according to principle that a burden of this character should rest upon the actual responsible owner, and, as a general rule, there is no safer party to pursue than the actual responsible owner, upon whom the ultimate liability must rest. Assuming that an assessment could have been successfully maintained against the agents who stood upon the bank records as owners, still the Comptroller might properly, in his discretion, elect to pursue directly the actually known owner. In doing so in this case, the Comptroller elected the most equitable of the legal remedies, and the one which sensibly avoided circuity of action and unnecessary litigation by striking at once at the sources upon which, if no exceptional circumstances exist, and necessary remedies were employed by the agents, the statutory burden must fall. It cannot be seen that any legal rule interposes in a situation like this, to prevent reaching a result directly. Neither can we see any prudential reason for pursuing an indirect legal course when a direct one is fairly open."

In **Davis vs. Stevens,** 17 Blatch., 259, Mr. Chief Justice Waite, delivering the opinion of the court, on page 261 says :—

"Under these provisions of law, it is contended that the registered shareholders alone can be charged with

statutory liability, and that an assignee of stock does not make himself responsible unless he accepted an actual transfer in his own name on the books. Stevens, by his transfer on the books, undoubtedly released the vendors from all future liability, because, as to them, the transfers were 'out and out,' in the language of the English cases, and not colorable only. They retained no interest whatever, and Elston, the registered transferee, although pecuniarily irresponsible, was capable in law of assuming the obligations of a shareholder. As between Stevens and Elston, however, Stevens was the real owner and Elston his authorized representative in the bank. As such a representative, Elston could vote the stock at elections, and receive and receipt for dividends. So too, he could sell and transfer the stock on the books, and such sale and transfer would, to a *bona fide* purchaser, pass the title, free from any claim of Stevens. Such being the case, I am unable to see how he (Stevens) can occupy any different position from what he would if the stock had been taken directly from his own name on the books and put in that of Elston. He is still the real owner, with Elston as his agent, especially authorized to hold for him the legal title. *Every principal is responsible for the obligations of his agent. The debt of the agent is the debt of the principal. By the rules of law which govern the relations of principal and agent the registry on the books in the name of Elston was, as between Stevens and Elston, in legal effect the same as a registry in the name of Stevens. The obligations which Elston assumed by reason of such registry were the obligations of Stevens.*"

Case vs. Small, 10 Fed. Rep., 722, was a suit by the Receiver of the Crescent City National Bank to recover an assessment on fifty shares of stock, which were sold just prior to the failure of the bank through a broker and were purchased by I. K. Small, but at

the instance of Small were transferred on the books of the bank by the broker into the name of his sister, Miss E. M. Small. Upon these facts the court said:—

> "And finally, it is argued under section 5151, Revised Statutes, no other person can be made liable unless at some time or other he has been a stockholder of record and been held out to the world as such. The law seems to be settled now that the owners of stock are liable under that section.
>
> "At the same time, those persons who hold themselves or allow themselves to be held out as owners of stock are liable whether they own stock or not. It would seem that the rules relating to the ownership of national bank stock are about the same as applied to partnership. Real partners are liable, though not publicly known as partners, and persons who allow themselves to be held out as partners are liable, though they have no real interest."

In the four cases just quoted from, it does not appear that any of the persons liable for assessments held shares originally as pledgees standing in the name of agents, but defendant in this case, as in those cases, is, in legal effect, registered through its agent on the books of the Bank; and more, is estopped by its conduct and representations from denying that it is the real owner of the shares, and just as defendant would, undisputably, be liable, although pledgee, if actually registered as a shareholder, so, because of the legal identity of agent and principal, in contemplation of law, the shares upon the books of the Bank are now reg-

istered in the name of defendant, and it is estopped thereby to deny its liability to creditors, and the entry of the name of defendant by the Bank's cashier on the Bank's stock ledger (in place of W. W. Hand) as the owner of the shares, was doing simply what, in contemplation of law, had been done at the instant of transfer from Delamater to Hand, and it may be presumed that the official list of stockholders kept by the Bank, pursuant to section 5210, Revised Statutes, did have the name of defendant in it as the owner of one hundred and seventy-two and one-half shares, for this was the clear understanding of the Bank's officers, and they will be presumed to have done their duty, and the stock ledger containing the name of defendant as owner, and the stock certificate book, the stubs of which tended to show defendant's ownership, were books of the Bank from which the stockholders' list was made up. Indeed, the Bank would have been held liable in damages to defendant after notice to it of its ownership, if it had transferred the shares from Hand without its consent, or if it had paid dividends to Hand and not to it. Defendant, upon demand, had also a clear right to vote the shares.

W. W. Hand was without the slightest interest in the shares, never had custody of the certificates, and was simply and solely agent of defendant; he was not known to the assignees of Delamater & Co., Delamater & Co., or George B. and George W. Delamater; they never consented to or ratified the transfer to him,

or had any knowledge of it, and the case of **Anderson vs. Philadelphia Warehouse Co.,** 111 U. S., 479, relied upon by the courts below as a governing authority for this case, was decided upon facts entirely different. In that case there was a refusal upon the part of the Warehouse Company to accept the shares in its own name, and before the acceptance of the pledge there was an agreement between the pledgors, the Bank, and the pledgee that an irresponsible porter, in the employ of the pledgee, should hold the shares in trust for the purposes of the pledge, and in that case there was no representation by the Warehouse Company that it was owner of the shares, but a distinctly contrary representation; neither the irresponsible holder or the Warehouse Company claimed, nor were they at any time paid, dividends by the Bank, nor did they at any time vote the shares or take any control of the corporation. Kern or Blumer & Co., the pledgors, during the entire period, were paid by the Bank the dividends, and were permitted to control it by voting the shares. **It seems strange that the learned courts below have failed to distinguish the facts in the case at bar from those governing that case.**

Mr. Justice Miller and Mr. Justice Matthews filed a dissenting opinion in **Anderson vs. Philadelphia Warehouse Co.,** *supra*, page 485.

In the case at bar, defendant originally occupied the usual trust relation of pledgee—

1. To hold the legal title to the shares.
2. To sell in case of default in payment of note.
3. To return the shares unimpaired when note is paid.

It accepted no other trust relation, and it is well-settled law that a trustee cannot discharge himself of the trust accepted, **by his sole action; it must be by the knowledge, consent, or ratification of the *cestui que trust;* such trustee cannot, of his own motion, invest another with the trusteeship, nor transfer the discretion involved in such a trust, unless express authority is given in the writing, creating it.**

There was no such authorization here. W. W. Hand could not be a trustee, implied or otherwise, in this case, for the assignees of Delamater & Co., Delamater & Co., or George B. and George W. Delamater.

Perry on Trusts, Sections 274, 287, 408, 409.

As before stated, the legal effect of taking this title to itself before default in note was to make defendant mortgagee instead of pledgee; it was entitled to hold the title as well as the possession of the shares as mortgagee until the debt secured by them was paid, and not before default in payment of the note, did it have any right to make a sale of the shares so mortgaged, and by this transfer from the Delamaters it released George B. and George W. Delamater from all liability to creditors and substituted itself in their

stead as shareholder, with all the rights and burdens attached thereto.

In **Anderson vs. Philadelphia Warehouse Co.,** 111 U. S., 479 (1884), Mr. Chief Justice Waite delivering the opinion of the court, on page 683, says:—

> "It is well settled that one who allows himself to appear on the books of a national bank as an owner of its stock is liable to creditors as a shareholder, whether he be the absolute owner or a pledgee only, and that, if a registered owner, acting in bad faith, transfer his stock in a failing bank to an irresponsible person, for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors. *National Bank* vs. *Case*, 99 U. S., 628; *Bowden* vs. *Johnson*, 107 U. S., 251. It is also undoubtedly true, that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder."

Adding to what has just been quoted—

> "But it has never, to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered as owner."

The court below put great stress upon the last quotation, and the defendant relies upon it for its defense to this action. It is a dictum, but it is not necessary for our argument to dispute this statement. **We confidently submit that the defendant in this case is not a "mere pledgee;" it at least became a mortgagee, and it *is* "registered" upon the books of the Bank in legal effect, because of the legal**

identity of agent and principal, and, further, because the cashier of the Bank did, in fact, enter its name in the stock ledger of the Bank as a shareholder.

In **Germania National Bank vs. Case**, 99 U. S., 628 (1878). The Bank loaned Phelps-McCullough & Co. $14,000, and one hundred shares of the Crescent City National Bank were pledged as security; the note was dated December 7th, 1872. A power of attorney was given to the cashier of the Crescent City Bank to transfer the stock to the Germania Bank in case of default in payment of the note by Phelps-McCullough & Co.; the note matured March 10th, 1893, and was not paid. The circulating notes of the Crescent City Bank went to protest March 17th, 1873, seven days after maturity of the note. Three days before its circulating notes were protested, to wit, on March 14th, 1873, and on the same day that payment of checks made upon the Crescent City Bank was suspended, the one hundred shares so pledged to Germania Bank were transferred on the books of the Crescent City Bank, by its cashier, under the power of attorney, from Phelps-McCullough & Co. to the Germania Bank. Immediately after this transfer, seventy-six of the shares were transferred by the Germania Bank to Waldo, one of its clerks, and on the next day the remaining twenty-four shares were so transferred. Waldo had no interest whatever in the shares, and there was an understanding that he would re-transfer them to the Ger-

mania Bank at its request. The cashier of the Germania Bank testified:—

> "We transferred because we are not in the habit of holding any bank stock. We did not want to have any bank stock in our name; that was the object."

If the power of attorney had not been executed to the cashier of the Crescent City Bank authorizing him to transfer to the Germania National Bank in case of default in payment of the note, it may be presumed that the stock would never have appeared for one moment in the name of the Germania Bank on the books of the Crescent City Bank; the shares would have been transferred to Waldo direct from Phelps-McCullough & Co. It is also to be noted in this case that on the very day this transfer was made the Crescent City Bank defaulted in payment of the checks of its depositors, and this must have been known to the Germania Bank. The facts in this case, with the exception of the failing condition of the Crescent City Bank at the time of the transfer, would be the facts in the case at bar if the stock had been transferred direct from Phelps-McCullough & Co. to Waldo, agent, at the instance of the Germania Bank. That case differs from the one at bar in the fact, also, that the Germania Bank did not represent that it was owner of the stock, as did defendant in case at bar. In the Germania Bank case, Mr. Justice Strong, in delivering the opinion of the court, on page 631 says:—

> "Such being the facts of the case, there can be no serious controversy respecting the principles of law ap-

plicable to them. It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman* vs. *Upton*, 96 U. S., 328, and like decisions abound in the English courts, and in numerous American cases, to some of which we refer: *Adderly* vs. *Storm*, 6 Hill (N. Y.), 624; *Roosevelt* vs. *Brown*, 11 N. Y., 148; *Holyoke Bank* vs. *Burnham*, 11 Cush. (Mass.), 183; *Magruder* vs. *Colston*, 44 Md., 349; *Crease* vs. *Babcock*, 10 Metc. (Mass.), 525; *Wheelock* vs. *Kost*, 77 Ill., 296; *Empire City Bank*, 18 N. Y., 199; *Hale* vs. *Walker*, 31 Iowa, 344. For this several reasons are given. *One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the reponsibilities of a stockholder.* This subject is well treated in Mr. Thompson's recently published work on "The liability of stockholders," where may be found not only a full collection of authorities, but a careful analysis of what the authorities contain. *Vide*, c. 13.

"When, therefore, the stock was transferred to the Germania Bank, though it continued to be held merely as collateral security, the bank became subject to the liabilities of a stockholder, and the liability accrued the instant the transfer was made. At that instant the liability of Phelps-McCullough & Co. ceased. We have, then, only to inquire whether the bank succeeded in throwing off that liability by its transfer to its clerk, Waldo. *It certainly did not thereby divest itself of its substantial ownership.*"

The title to the shares in the case at bar in legal effect passed (1) from G. B. and G. W. Delamater to Delamater & Co.; (2) to defendant [and a contingent interest to assignees of Delamater & Co. (abandoned May 1st, 1895)], and (3) from defendant to W. W. Hand, its agent.

The facts in this case are much stronger in favor of the Receiver than the facts in *National Bank* vs. *Case*, *supra*.

In **Pauly vs. State Loan & Trust Co.** (1897), 165 U. S., 606, it is *held*—

> "(2) That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, if, by the direction or with the knowledge of the pledgee the shares are placed on the books of the association in such a way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder within the meaning of section 5151 of the Revised Statutes of the United States, and therefore liable upon the basis prescribed by that section for the contracts, debts, and engagements of the association."

The case at bar is even stronger than is required to come within the rule thus laid down by this court, for the defendant had possession and custody of the certificates duly assigned with powers to transfer at any time, voted the shares, paid the call to make good impaired capital, accepted reduced number of shares in lieu of the full number pledged and for a number of years acted and represented itself to be the owner and was so entered upon the books of the Bank, and after the first Monday of August, 1896, a year before the Bank's failure (when the final account of the assignees

was confirmed), was the only one that had any possible interest in them.

No demand was made on the individual members of the firm of Delamater & Co. for the payment of this note after the failure of the firm in 1890. Under the laws of the State of Pennsylvania an action upon a promissory note is barred in six years from its maturity. This note matured January 17th, 1891. The Bank closed its doors on June 26th, 1897, more than six years afterward; during all this time and to the present no demand for payment has been made upon the Delamaters individually or as a firm, nor has the note been sued to judgment. On January 17th, 1897, several months before the Bank closed its doors, the claim against the Delamaters was barred by the Statute of Limitations of Pennsylvania. It is true that a dividend was paid from the assigned estate by the assignees of Delamater & Co., March 30th, 1893 (page 76), but the law is well settled that the limit of the statute is not thereby extended, because a new promise to pay is not implied when a payment is made by the bankrupt's representatives. The fact of the bankruptcy is itself a presumption to the contrary.

Christy vs. *Flemington* (1848), 10 Pa. St., 129;
Roscoe vs. *Hale*, 7 Gray (Mass.), 275;
Id. *Stoddard* vs. *Doane*, 388, 13 Gray, 381; 34 Barb., N.Y., 193; 17 Neb., 90; 16 Ohio St., 566; 58 Vt., 533; 1 R. I., 81; 2 R. I., 401.
Spangler vs. *Spangler*, 122 Pa., 358, approving *Christy* vs. *Flemington*, supra.

That an action to recover on the note of Delamater & Co., was barred on January 17th, 1897 (before failure of Bank), is important for the reason that in Pennsylvania it is a rule well stated in **Waterman vs. Brown,** 31 Pa. St., 161, that if the pledgor fails, for more than six years—rests upon his rights—to redeem his pledge, by an offer to pay debt, in a case like this where the pledgee has converted to his own use the pledged security in lieu of claim upon the note, the six year limit of the statute—the rule at law—will be adopted as the rule in equity and will bar recovery of the pledge. (See also **Hayward vs. National Bank,** 96 U. S., 611.) Therefore, on January 17th, 1897, under the laws of Pennsylvania, the limit of the statute barred any right of action existing in Delamater & Co. or its individual members to recover the pledged shares upon payment of debt just as it did the right of the defendant to sue the note to judgment against Delamater & Co. or its individual members, and on that day all rights of action growing out of the pledge of March 1st, 1889, had been obliterated between all parties thereto, except the assignees of Delamater & Co., and on May 1st, 1895, these assignees abandoned all their interest in the shares and so reported to the court, and the court in confirming their report finally discharged them on the first Monday of August, 1896, when all rights adverse to defendant were publicly and finally abandoned. At the time, therefore, defendant wrote the letters to

Bank on March 17th, 1897 (page 46); March 20th, 1897 (page 108); April 8th, 1897 (page 108), and October 14th, 1897 (page 46), every interest other than that of defendant in the shares had disappeared and it was in truth the real owner.

Respectfully submitted,

ASA W. WATERS,
Of Counsel for Plaintiff in Error.

REPLY TO BRIEF OF COUNSEL FOR DEFENDANT IN ERROR.

Since completing the foregoing brief, counsel for plaintiff in error have been handed that of learned counsel for defendant in error, and make reply thereto.

The following assignments of error relied upon by plaintiff in error for estoppel were partly or wholly omitted by mistake in the enumeration in plaintiff in error's brief (pages 46–52, inclusive), to wit:—

"9. That the said court erred in refusing to give to the jury at the trial of the above-entitled cause, binding instructions for the plaintiff in error for the amount of his claim (upon the law and evidence), being the third point of charge requested by the plaintiff in words as follows, to wit:"—

"3. You must find a verdict for the plaintiff for the amount of his claim." (Pages 153, 154.) (Page 133.)

"5. That the agreements as to facts and the matters therein contained and the evidence produced at the trial of the above-entitled cause are not sufficient in law for the said defendant to have or maintain its aforesaid judgment against the said plaintiff in error; the said defendant being thereby estopped to deny its liability for the assessment levied by the Comptroller of the Currency of one hundred per cent. upon the one hundred and seventy-two and one-half shares of the capital stock of said Keystone National Bank of Erie, with interest thereon at six per cent. per annum from the day that same was made payable, December 3d, 1897." (Page 151.) (Page 131.)

Plaintiff in error by express reference to particular assignments of error does not thereby wish to waive any one of his assignments.

It is claimed by plaintiff in error that upon all the evidence defendant in error is estopped to deny (1) its liability to Bank's creditors; (2) that W. W. Hand was its agent; (3) that it converted the shares to its own use; (4) that it was the real owner, or (5) to affirm that the Delamaters or their assignees were stockholders, directly or indirectly, liable to creditors.

Phila., Wilmington & Baltimore R. R. Co. vs. *Howard* (1851), 13 Howard, 307, and particularly from the opinion of Mr. Justice Curtis, on pages 335–337;

Dickerson vs. *Colgrove* (1876), 100 U. S., 578, and particularly from the opinion of Mr. Justice Swayne, on pages 580–584;

Insurance Co. vs. *McCain* (1877), 96 U. S., 84–86;

Bronson, Executor, vs. *Chappell* (1870), 12 Wallace, 681, and particularly from the opinion of Mr. Justice Swayne, on page 683;

Thompson vs. *First National Bank of Toledo* (1883), 111 U. S., 529;

Ewart on Estoppel (1900.)

The letter of defendant, dated October 14th, 1897 (page 33), informing the Bank that "the stock in the name of W. W. Hand belongs to this Company" is omitted from the statement of facts in defendant in error's brief. While written after the failure of the Bank, it plainly confirmed the truth of the impression it had made upon the Bank by its letters written before its failure. It is a ratification of its preceding correspondence.

An examination of the records and opinions in the cases relied upon in defendant's brief, shows that they do not sustain defendant's position.

We have already discussed **Anderson vs. Philadelphia Warehousing Co.** and **National Bank vs. Case** (*supra.*)

Pauly vs. State Loan & Trust Co. is a case where the defendant was registered as "Pledgee." Defendant there asserted no ownership of the stock, and the pledgors were officers of the bank at the time the loan was made, and it had notice of the transaction.

In **National Park Bank vs. Harman,** 79 Fed., 891, affirmed "Per Curiam," 172 U. S., 644. The record shows that the National Park Bank never, in the slightest way, claimed ownership of the shares to the failed bank, which was fully cognizant of the true transaction.

Wilson vs. The Merchants Loan & Trust Co. 98 Fed., 688, affirmed 183 U. S., 121 (because not properly brought for review to this court), is a case where the president of the insolvent bank is pledgor, and the defendant at no time represented itself to be the owner of the shares, but to the contrary, in all its correspondence asserted that it was pledgee only, and at no time took any part in the management of the bank itself or through Peterson. This was also true in **National Park Bank vs. Harman** (*supra*), and **Pauly vs. State Loan & Trust Co.** (*supra*), and further, there was a failure to show that the pledgor or his assignee did not expressly ratify the transfer of the shares to Peterson as well as the consolidation of the two banks. In the case at bar the evidence does show positively no knowledge, consent, or ratification by the pledgor or its assignees.

Robinson vs. The Bank, 94 Fed., 964, affirmed 180 U. S., 295, is a case where the stock always remained registered in the name of the pledgor; it was bid in at auction at a nominal price by the pledgee bank, but was never put in the pledgee's name, and was afterward, before failure of bank, tendered to the pledgors when they contended in a suit in Texas that

the stock belonged to them, and the sale was irregular by the pledgees, and this court held that upon these facts the pledgee bank was not liable, and that the pledgors were estopped to assert the bank's ownership of the shares. This case is irrelevant to the one at bar.

Matteson vs. Dent does not pass upon the question involved in the case at bar at all; it refers to the case of **Pauly vs. The State Loan & Trust Co.**, where the defendant's name was registered as "pledgee," as an exception to the rule holding pledgees, when registered, as shareholders.

The learned counsel for defendant in error, in his brief, apparently admits that the defendant in error upon all the evidence, is estopped to deny its liability as a shareholder to the creditors of the insolvent Bank, represented by the plaintiff in error, and simply rests his case upon the statement: "We respectfully submit that these are matters which are not properly the subject of consideration upon this writ of error. Parties are held in this court to a strict recognition of the functions of the court in error in proceedings at law. Abstract and general considerations of the rights of the respective parties have no place here. They who seek to reverse the judgment at law must point specifically to error in the record." (Defendant's brief, pages 34, 35.)

The estoppel *in pais* claimed by the plaintiff in error upon all the evidence in this case, we think, is properly before this court upon the record.

The action is one in "*assumpsit.*" (Page 4.) The defendant pleads "*non-assumpsit.*" (Page 12.)

There was, therefore, no necessity, because no opportunity, to plaintiff in error to plead the estoppel.

P. W. B. R. R. Co. vs. *Howard*, supra.

The estoppel upon all the evidence is a question of law for the court. In Pennsylvania this is a well-settled rule.

Lewis vs. *Carstairs*, supra;

Keating vs. *Orne* (1874), 77 Penna. State, 8ft, approving *Lewis* vs. *Carstairs;*

Ewart on Estoppel (1900), pages 189–191.

This question of estoppel *in pais* is, therefore, properly before this court in the case at bar, for, in addition to its being the rule in Pennsylvania, it is the rule and practice in this court.

The third point asked of the court by plaintiff in error was for binding instructions in his favor for the amount of his claim. This point was refused. (Page 118.) The consideration by the court of this point involves, therefore, a review of all the evidence under the law for estoppel *in pais.*

The plaintiff's first point (page 116), refused by the court, was based upon enumerated facts constituting an estoppel *in pais.* The same is true of the fifth point requested of the court (page 119), which was refused. Counsel for the plaintiff then and there excepted to the refusal of the court to affirm each of the points so refused and to each of the defendant in

error's points affirmed by the court, and also to the court's saying in the general charge "that the only question in the case is one of fact; that the burden of proof is upon the plaintiff as to the beneficial ownership of the one hundred and seventy-two and one-half shares registered on the books of the Bank in the name of W. W. Hand, and that portion of the general charge in which the court deals with the matter of the right of said defendant to put the stock in the name of W. W. Hand without the knowledge, consent, or ratification of the pledgors or their assignees," all of which exceptions were noted at the time and are fully set forth in the bill of exceptions, on page 120 of the record, also upon pages 14 and 15 of the record, where they are more fully set forth in the bill of exceptions. The charge of the court to the jury was on October 18th, 1900. (Page 113.)

The defendant in error also asked for binding instructions (page 120), and the court answered: "That point is reserved; I shall put it in this form: The court reserves the question whether there is any evidence to go to the jury in support of the plaintiff's claim." The jury apparently regarded this as binding instructions in favor of the defendant and almost immediately brought in its verdict accordingly. Two days after the charge of the court, on October 2[illegible], 1900 (page 125), plaintiff in error moved for a new trial (pages 121–125, inclusive), among other reasons:—

"Because the verdict of the jury is against the law and the evidence." "Because the learned court erred in refusing to affirm the first point submitted by the plaintiff," (which point enumerated the facts constituting the estoppel *in pais*, &c.), and also for the following reasons:—

"*Tenth.*—Because the learned court erred in not refusing the sixth point submitted by the defendant, which was as follows:—

6. "Under all the evidence the verdict must be for the defendant."

The answer of the court to this point was as follows:—

"That point is reserved. I shall put it in this form—the court reserves the question whether there is any evidence to go to the jury in support of the plaintiff's claim."

"*Eleventh.*—Because the learned court erred in overruling the objections taken by the plaintiff to the answer of the court to the plaintiff's first, second, third, fourth, and fifth points; and also to the court's saying in the general charge that the only question in the case is one of fact, and also to that portion of the charge in which the court deals with the matter of the right to put the stock in the name of W. W. Hand, to the overruling of each and all of the objections on behalf of the plaintiff to the ruling of the court, the plaintiff then and there did except upon each of the

matters as hereinbefore stated, and exceptions were allowed to the plaintiff by the court."

"*Twelfth.*—Because the verdict of the jury was contrary to law." (Page 125.)

The question of estoppel *in pais* was fully argued to the court upon this motion for a new trial, who had then reserved the question whether there was any evidence to go to the jury in support of the plaintiff's claim. The motion for a new trial was overruled by the trial judge on December 7th, 1900 (pages 126, 127), and on December 24th, 1900, the bill of exceptions was signed and sealed by the trial judge, and filed, and on the same day judgment had been entered on the verdict (page 128); and also on the same day (December 24th, 1900) (page 136), the assignment of errors was filed (pages 128–136, inclusive) to the United States Circuit Court of Appeals.

The silence and negligence of the defendant in error, whether willful or not, in concealing from the assignees of Delamater & Co. the payment of the $5750, on September 16th, 1892, under the twenty-five per cent. assessment, made pursuant to section 5205, Rev. Stat., U. S., to make good the impairment of the Bank's capital was directly prejudicial to the assignees, for this payment was voluntary and the only penalty for non-payment would have been a sale of so many of the then two hundred and thirty shares as would be necessary to satisfy the assessment. If

the assignees had been advised at that time, it is not only possible, but probable, that they might have secured a sale of these shares that would not only have paid the debt of the defendant in error, but have left to them an equity for the creditors of Delamater & Co., and this voluntary payment by defendant, without the knowledge, consent or ratification of the Delamaters or their assignees, was an "investment" in the shares by it, unauthorized by the holders of the equity and in connection with defendant's allegation of ownership of the shares to the assignees on or about May 1st, 1895, and the consequent waiver by the assignees in their final account to the court, of any equity in the shares absolutely estops defendant in error to say that these assignees remained stockholders, beneficial or otherwise. These acts were prejudicial to their interests. It was prejudicial also to the depositors of the failed Bank that defendant in error, without any previous agreement with the pledgors and the Bank (as in the case of **Anderson vs. The Philadelphia Warehousing Co.**, *supra*) transferred the legal title out of the name of the Delamaters into the name of Hand, its own agent, because, as Mr. Justice Strong says in **Bank vs. Case,** *supra*, "by taking the legal title, he has released the former owner," and further, defendant, by holding itself out to the Bank as the owner of the shares in the name of Hand and expressly ratifying the payment of the assessment and the voting for the reduction of the capital stock by Hand, by its letters of January 24th, 1893 (page 32) (page

42), and April 8th, 1897 (page 108), so impressed the Bank with its ownership that its name was entered upon the books as the owner of the shares, and it must be presumed that as these were the books, as the evidence shows, from which the list of stockholders was made up, as required by section 5210, Rev. Stat., that depositors dealt with the Bank upon the credit of the defendant, who held one-ninth of its entire capital stock. This claim of ownership by the defendant in error, also estops it to affirm that the Delamaters or their assignees were owners, and the Bank, having accepted and entered upon its books defendant in error as the owner of the shares in the name of Hand, is estopped also to make any claim against the Delamaters or their assignees for the collection of the assessment.

The fifth assignment (page 131), just above quoted, very clearly designates the error complained of.

With the petition in error to this court was filed the assignment of errors and complaint as per Rule 8. (Pages 149–158, inclusive.) This assignment of errors includes those filed to the United States Circuit Court of Appeals.

Counsel respectfully calls this court's attention to the fact that it was necessary to submit the evidence in this case to the jury upon plaintiff in error's behalf upon depositions, as plaintiff's witnesses were beyond the jurisdiction of the court. The only witness that appeared upon the plaintiff's behalf, in person, was Mr. George H. Higgins, then Receiver.

There appear in the depositions numerous objections to the admission of testimony, and by mistake they were copied into the record. These objections were all waived by the defendant in error at the trial, with the exception of those ruled in its favor by the trial court and brought to this court for review, and contained in plaintiff in error's assignment of errors.

Respectfully submitted,

ASA W. WATERS,
Counsel for Plaintiff in Error.